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IN THE

Supreme Court of the United States

October Term, 1958

No. 680

MARIA JERITZA SEERY,

Petitioner

v.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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The petitioner prays that a writ of certiorari issue to review the judgment entered in this case on May 7, 1958, by the United States Court of Claims, and denial of the motion for rehearing on November 5, 1958.

Opinion Below

The opinion of the Court of Claims herein, entered on May 7, 1958, is appended hereto (A. 1-39).

Jurisdiction

The judgment of the Court of Claims concerning which petitioner is requesting a writ of certiorari was entered on May 7, 1958, and motion for rehearing, timely made, was overruled on November 5, 1958 (R. 167). The jurisdiction of this Court is invoked under 28 U. S. C. 1255.

Questions Presented

A. Whether the United States Army may requisition, after cessation of hostilities, and take from petitioner, a United States citizen, real and personal property for public purposes, exclude the petitioner therefrom thus disabling her from making an inventory, remain in sole control, fail to record what it has taken or give a receipt therefor for a period of 13 months after requisition—during which interval the property claimed was lost, destroyed or disappeared—and the Court below deny just and fair compensation to petitioner on the ground that her property may not have been present at the time of requisition.

B. Whether uncontradicted testimony of the Government's own witnesses given on direct examination, or elicited on cross-examination, proving the presence and use by the Army of the property claimed, may be disregarded consistently by the Court below.

C. Whether the petitioner must prove how her property was damaged or disposed of, and the extent of damage, while the Army was in sole control—established law to the contrary.

D. Whether the Government may suppress the Army's inventories of petitioner's property as a device to evade responsibility for the missing property.

E. Whether the Government is estopped by its misconduct set out in "A" and "D" above from denying petitioner's claim and profiting by its wrongdoing.

F. Whether the petitioner should be restricted to interest at less than 1% per annum, where the Court of Claims found that she suffered damages and had been deprived of her property since 1945.

Statement

1. Mrs. Seery, a United States citizen, brought suit to recover just compensation for damage to her private real and personal property in Unterach am Attersee, Austria (A. 8-9, F. 1, 2), requisitioned and used by the United States Forces as an officers' recreation center, from June 1945[1] to June 30, 1947. The Court below in January 1955 by a unanimous decision (130 C. Cls. 481) held that Mrs. Seery was entitled to just compensation under the Fifth Amendment for damages suffered upon proof of the facts alleged; that Austria was a "liberated" country; and that the Keyes-Fiegl Agreement of June 21, 1947 could not impair the constitutional rights of Mrs. Seery, a loyal American citizen. Although not the subject of a finding, said opinion was adhered to in the judgment (A. 8) of May 7, 1958.

2. Hearings as to damages were had before a Commissioner.

3. Mrs. Seery's property consisted of a castle-like villa and landscaped garden, beautifully located on a lake, surrounded by mountains and forests, known as the "House on the Lake," No. 100 Maria Jeritza Street (also known as the "Haus am See" #100), with a boathouse, a garage, a bathhouse and a small garden house; a nine-room Guest-House across the road, No. 99 Maria Jeritza Street (also known as the "Stoeckl"); and the Wachtl Villa, No. 125 Maria Jeritza Street, occupied by Mrs. Wachtl, petitioner's sister, and her family, a short distance away (A. 9, F. 3; Pl. Ex. 60-A, B, C; 1167).

4. The House on the Lake #100 consisted of an old wing, a new wing (built in 1931), and a tower as part of the new wing completed in 1936. It was luxuriously furnished with some fine antique pieces, Oriental rugs,

[1] Tr. 1719, 219; Pl. Ex. 49, 858; A. 16, 21 F. 24, 32.

figurines and other objects of art, paintings, silver, china, crystal and quantities of fine linen. Mrs. Seery, who is an opera singer of international renown, frequently entertained royalty and notable personages during her summers at Unterach (A. 9-10, F. 4-5).

5. The petitioner also occupied a 12-room apartment in Vienna, Austria, which was similarly luxuriously furnished (A. 10, F. 6).

6. In September 1935, Mrs. Seery closed her Vienna apartment and shipped most of her furnishings to Unterach. After making an inventory, she then closed her Unterach property. Her silver was stored in three locked trunks (one having come from Vienna), in the caretaker's room in the Guest-House #99. The missing personal property (other than silver), which had been in both the Vienna apartment and the new main wing, was left in the new main wing of the House on the Lake #100, and each room of said wing was separately locked (A. 10-11, F. 7, 8). The property in the old wing was not of great value, and most of it was recovered. A caretaker, Speigner (now dead), and Brauneis, a kitchen maid, remained in charge, and Mrs. Seery left for her Beverly Hills, California home. During the war, she entertained U. S. Troops in canteens and hospitals, and remained in the United States until 1948 (A. 11, F. 9).

7. Upon Mrs. Seery's visit to Unterach in 1948 (A. 26, F. 41), she found the House on the Lake #100 in a deplorable condition; the paneling was scratched and ruined, in many places it had been removed; the floors which were shiny and mirror-like on her departure now looked as though they had been trod on by nailed boots; the house had not been painted, the outside walls were cracked and had holes because of missing plaster; the plumbing would not function; fixtures had been removed from the bathrooms; dirt fell from the ceilings; the cocktail bar built in 1936 looked as though it had been in use for 30 years;

the flowers and landscaping were gone from the garden—nothing remained but stones and gravel (Tr. 1192-1205). Although only ten heavy pieces of furniture were missing, 37 fine French and Persian rugs had been removed, rare tapestries and objects of art had disappeared, nothing remained of Mrs. Seery's exquisite china, crystal and silver, except some odd cups and saucers and miscellaneous pieces of once complete dinner services and crystal sets, found in the cupboards of House #100, and miscellaneous pieces of immensely valuable silver services which had been stored in all three locked trunks. Only a very few other collection of Meissen figurines remained; old Meissen pieces and carvings, a jade vase, two jade lamps and many other costly vases and lamps, antique clocks, Brussels lace curtains, luxurious draperies, silk and fine linen sheets and pillowcases, silk comforters, expensive lace tablecloths, and other objects had disappeared together with 27 paintings, including an irreplaceable one of Mrs. Seery herself (R. 58-97).

8. The Court found that "plaintiff has fairly well persuaded us that most of the things for which she sues were on the property in 1935, and had disappeared by 1948" (A. 4).

9. The caretaker's wages were paid and repairs made to the property until 1943; and the Government's own witnesses on direct examination testified that the contents (now missing) of the new wing were still undisturbed, with the rooms separately locked, and in good order as late as *1944*.[2]

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[2] Petition for Rehearing, pp. 3-4, 68-70, 79-80; Tr. 228-30, 237; 629; 1490; 277. The Court, however, held that the contents of the new wing were under lock and key and undisturbed *only* until *1943* (A. 2).

10. The first disturbance[3] of the new wing occurred in May 1944, when a German Nurses School and Maternity Home for Unmarried Mothers moved into House #100. Immediately prior thereto, Mrs. Wachtl, petitioner's sister (now deceased), was directed by the German Authorities to remove Mrs. Seery's valuable possessions in the new main wing of House #100 for safekeeping to the Guest House #99, where they were placed in two locked rooms, formerly used by Mrs. Seery's royal guests and known as the "Royal Salon" (A. 3; Tr. 405-6).

11. This Nurses School installed its own equipment, and was still in possession when the U. S. Forces arrived in Unterach (A. 18-19, F. 22-24). The House on the Lake #100 was requisitioned by the Army in June 1945, as above stated, a few weeks after the cessation of hostilities on May 7, 1945. The officer in charge, a Captain Clayton, found the new wing "practically barren." He testified that he made a one-page inventory thereof, consisting of the principal items with no details (Tr. 1837-8; 1758, 1768) —which was never produced (A. 24, F. 34). He then sent to a nearby factory for dishes and obtained some furniture from a barn (Tr. 1722, 1725; A. 22, F. 29). A Mrs. Boone was employed as hostess for the Army, and thereafter on learning from her that the new wing had at one time been beautifully furnished (Tr. 1515), Captain Clayton directed that Mrs. Seery's belongings be returned, under Mrs. Boone's supervision, from the locked rooms in the Guest House #99, and that locked trunks and nailed crates and boxes in which Mrs. Seery's china, crystal, linen, etc., had been stored be opened and their contents put in use (A. 20, F. 27).

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[3] The Court erroneously found there was "some evidence, by no means conclusive, that in 1941 a unit of the German Army occupied the property" (A. 2). *The German Army never occupied said premises.* If so, it would have been seen in the small village. The defendant had in its exclusive control the records of the local authorities and any such occupation would have been proved as thoroughly as the defendant proved the presence of the German Nurses School.

12. Captain Clayton forced open (Tr. 93-98; 786-794) one of Mrs. Seery's locked silver trunks which had been left by her in the caretaker's room in the Guest House #99. Clayton testified he removed service for 12 (Tr. 1815), which was one-tenth of the contents thereof (Tr. 1731). Three days later, further silver was removed (A. 22-23, F. 30). Said forced trunk in an unlockable condition was found, empty of silver and filled with old lamp parts, in the attic of House #100 while the Army was still in possession, and another of Mrs. Seery's silver trunks with its lock forced was found in the bathhouse (Petition for Rehearing, pp. 35-7, 46-7, 56-7, 78, 90-2).

13. The Court below disregarded the testimony of the Government's own witness Brauneis, petitioner's former kitchen maid above referred to, on direct examination, that, when the Americans were there "the same furniture was there as was there before" (Tr. 459), and testimony of three other of the Government's witnesses on direct examination that "the new part of the main house was (then) completely refurnished; it was furnished good" (Tr. 668), and "I didn't know where the furniture came from, but the house was all fixed up again, or fully furnished" (Tr. 730), and "there was very special elegant and good furnishings in the house" (Tr. 535). Mrs. Boone, hostess for the Army, admitted on cross-examination "* * * all the furniture was handsome in there. It was lovely stuff; it was pretty" (Tr. 1609-10). Even Captain Clayton, on intensive cross-examination, conceded with ill grace that "It may have been elegant by some standards" (Tr. 1806-7). The Court also disregarded uncontradicted evidence of use by the Army of Mrs. Seery's missing belongings (see Appendix B). Instead, the Court found that it had the "impression" that little of plaintiff's property came into the possession of the Army (A. 7).

14. During its occupation, the Army barred the petitioner's family,[4] who lived in the Wachtl Villa #125, from the House on the Lake #100, commanding Mrs. Wachtl's presence when the Army wanted the keys to the locked rooms in the Guest House #99. (Tr. 1798, 1812; 88; 821; 323-4; A. 20, 22, F. 27, 30). Mrs. Seery and her family were thus disabled from making an inventory of their own. They were also barred from the Guest House #99, and Mrs. Seery's caretaker, Speigner, was discharged by the Army soon thereafter and compelled to leave the premises (Petition for Rehearing, pp. 35-6, 73-6).

15. During the first year of occupation, over 1,000 young officers in relays were quartered in the House on the Lake #100 for two-week periods. There were parties given, with dances and entertainment on alternate nights, to celebrate the tremendous Allied victory. A six piece orchestra and entertainers were provided; female guests were invited. There was drinking to the extent that might have been expected (A. 4, 23-4, F. 32). Mrs. Seery's landscaped garden was used as a baseball diamond by the 1,000 young men, and for horseshoe pitching; ping-pong tables were installed; there was boating and fishing and swimming in the lake which bordered the garden, a diving tower was erected. A local staff of 8 to 10 was required to provide three meals a day, bedding accommodations, outside work, etc. (Tr. 1876, 1889).

16. Captain Clayton failed to make an inventory of Mrs. Seery's property after it had been refurnished with her belongings, or, if so, it was not produced (A. 20, 24, F. 27 (2nd par.), 34). If an inventory and statement of the condition of the premises had been made (or produced), this litigation would have been unnecessary.

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[4] Mrs. Seery's family consisted of Mrs. Wachtl and Mrs. Kroner, her sisters; Dr. Leo Wachtl, her nephew, an attorney, his wife and four children; Miss Cinda Wachtl, niece, and her fiance Mr. Max Ricker Hutter.

17. Captain Clayton was succeeded by four different officers. Lt. Ball, Lt. Edwards, Lt. Billy Brown, Lt. Riley (now Captain Riley). The latter took over command of the property late in July 1946 (Tr. 1966), and at that time[5]—more than 13 months after requisition—he made the first Army inventory (A. 24, F. 33-4) of plaintiff's belongings in both the old and the new wings of House #100, in the presence of Mr. Landzettel, a representative of the Bank-Administrator (appointed by the U. S. Military Forces in January 1946), who had theretofore been barred from the premises (A. 24-5, F. 35). Said inventory consisted of 25 typed legal size pages (pointing up the inadequacy of Clayton's alleged one-page inventory) (Pl. Ex. 7, Pre-Trial Memo).

18. A receipt and copy of Captain Riley's inventory were forwarded to Mrs. Seery on September 28, 1946, and were produced by her. No inventory made by the Army was ever produced by the Government.

19. During the second year of occupation, the premises were visited by a few senior officers and their families for weekends; there were no parties (Tr. 1862; A. 24; F. 32). Upon derequisition on July 11, 1947, the Bank Administrator took over custody of the property listed in Captain Riley's inventory (A. 25, F. 36), and no further damage was done from derequisition until Mrs. Seery's return in August 1948.

20. In view of the fact that Mrs. Seery was disabled by the Army from making her own inventory, and the Army failed to produce its inventory made at the time of requisition, Mrs. Seery has furnished the best evidence of which the case is susceptible, and the intendment should be in

[5] The Government's witness Landzettel testified the inventory was made on August 2, 1946 (Tr. 324).

her favor.[6] However, the Commissioner found that she had not proved by a preponderance of evidence *any* damage to her real or personal property during the first year of occupation (R. 129; Comm. F. 58); that, during the second year, based on Captain Riley's inventory and its check-out on derequisition, Mrs. Seery had proved damages to her personal property, for which indemnification (as distinguished from just compensation) should be awarded her in the sum of $2,132; and $670.81 as indemnification for damages to her real property (R. 118, Comm. F. 37-8, 41, 48-52, 57 (2nd par.), 60).

21. The Commissioner found that no inventory was made by the Army because there was not a single piece of paper available, and a condition comparable to combat existed (R. 112, Comm. F. 24). The point is, however, that the Army did not make an inventory for 13 months after requisition (R. 117, Comm. F. 35). The volume of letters written home by the members of the Army during said period and the fact that hostilities had long since ceased, contradicted said untenable finding.

22. The Court below amended approximately half of the Commissioner's findings and awarded petitioner $10,000 in the nature of a jury verdict, with interest limited to an additional $1,000 as part of compensation (A. 7-8). Petitioner had sued for $241,843.83 for the loss of the luxurious furnishings of her 12-room Vienna apartment and Unterach castle (A. 37, F. 56), and $11,745 which she was required to pay for necessary repairs to her Unterach real property and garden in 1948 (A. 38-9, F. 59-60).

Reasons for Granting the Writ

As to Question A: The instant case presents the question of whether the Army may requisition and take from a

[6] *Cramp & Sons, v. U. S.*, 50 C. Cls. 179; *Story Parchment Co. v. Paterson Co.*, 282 U. S. 555; *Matter of Huss*, 126 N. Y. 537, 12 LRA 620.

citizen real and personal property for public purposes, viz.: an officers recreation club, exclude the owner and her family thus disabling them from making an inventory, remain in sole control, and fail to inventory and give a receipt for that which it has taken, for a period of 13 months after requisition—during which interval the property claimed by the owner to have been present and requisitioned was lost, destroyed or disappeared. Can the Court of Claims under such circumstances, deny just compensation to Mrs. Seery on the ground that the property *may* not have been present at the time of requisition?

The Third Amendment to the Constitution provides:

> "No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law."

The Fifth Amendment provides that private property may not be taken for public purposes without just compensation. Under the Second War Powers Act of 1942, Title VI (56 Stat. 181), the President was given the power to determine the amount of fair and just compensation to be paid for requisitioned property, such determination to be made "as of the time it is requisitioned." (See Appendix C.)

War & National Defense (93 C. J. S., Sec. 23, at p. 52) spells out the procedure to be followed for payment of compensation when property is taken in wartime:

> "The making of compensation for property requisitioned in time of war is not a condition precedent to the right to take the property or to the vesting of title thereto in the government, and it is not necessary that compensation be paid in advance of, or contemporaneously with the taking, the constitutional right of the owner being to have just compensation, not to its immediate adjustment or payment.

So a statute authorizing requisitions which makes reasonable provision for the compensation of the owner meets the constitutional requirements as to due process of law and taking property for public use. * * *."

Then Section 23 continues explicitly to spell out the procedure when property is *not* paid for prior to, or contemporaneously with, the taking, viz.:

"* * * If, however, compensation is not made *at once* for property requisitioned by a military commander, *he should have it valued by disinterested persons, and deliver to the owner evidence of the taking and of such valuation, so that compensation may be obtained from the government.*" (Emphasis ours.)[7]

The above italicized statement is sound and expresses clearly what the procedure should be. However, the decision of the Court below (viz.: that the failure of the Army to make such valuation [inventory] and deliver to the owner "evidence of the taking and of such valuation" for over a year—during which time 1,000 young officers were quartered on the premises—makes the Government's position only "somewhat more vulnerable" [A. 5]) is at utter variance with the above italicized categorical statement and the Second War Powers Act. There are no legal precedents for the rationale of the Court below, and a search of the law fails to disclose that this particular question has ever before been passed upon by a court of law.

This question assumes significance not only under constitutional but under international law as well. The United States is a party to the Hague Convention which provides that private property may not be confiscated; in fact, the

[7] The case cited for this proposition, viz.: *Howard's Adm'r* v. *Cooper*, 5 Kentucky Op. 552, is a Civil War case merely holding that the owner may recapture title from the Government "unless in a reasonable time the value shall have been legally fixed and paid or offered."

receipt eventually forwarded to Mrs. Seery (Pl. Ex. 7) contains a reference to Article 52 of the Hague Regulations, which reads:

> "Art. 52: Requisitions in kind and services * * * shall, as far as possible, be paid for in cash; if not, a receipt shall be given and payment shall be arranged as soon as possible."

In commenting on said Article 52, the "International Economic Law of Belligerent Occupation" put out by the Carnegie Endowment for International Peace, Division of International Law, stated at page 33:

> "In 1870-1 * * * The Germans frequently failed to give receipts or else gave only receipts which were illegible or without validity. Since then there has been a strong tendency to make the existence of a receipt a formal requirement. Garner (Am. Journal Int. Law, Vol. 11 (1917) p. 92) includes among his complaints about the dismantling of Belgian factories the statement that the owners were not furnished with receipts."

In its instructions "Military Aid to the Civil Power," concerning requisitioning procedure by the Army as an occupying force, the U. S. General Service Schools, Fort Leavenworth, Kansas, set forth a form of receipt requiring itemization of each article, and stated firmly in its 1925 manual (p. 134):

> "Private property taken for the use of the occupying forces should be paid for in cash, if possible, at a fair valuation. When for any reason, cash payment is not made *on the spot*, a receipt must be given in each case." (Emphasis ours.)

And the pertinent U. S. Army Standard Operating Procedure for Acquisition of Real Estate in Occupied and Liberated Territories #37 (Austria being a liberated territory), dated January 31, 1945, reads:

"f) *Immediately upon the occupation* of any property * * * the commanding officer of the occupying unit will cause an inventory to be made of all equipment, movable fixtures and personal property found on the premises * * *. The inventory will be made in *triplicate* * * *.

h) Before vacating real estate, the commanding officer of the occupying unit will * * * assist * * * in checking the survey and inventory, and to explain any deficiencies or damages." (Emphasis supplied)—See Appendix D.

Are the words "at once," "on the spot," and "immediately upon the occupation" to be strained and distended —as the Court below has done—to cover a period of 13 months after occupation, during which time the owner's property has been lost, destroyed or disappeared?

To know, as a result of the decision below, that it may thus, with judicial sanction, take property for which it does not have to receipt, gives the Army overwhelming power to override property rights under the constitution, jealously guarded since the adoption of the first 10 amendments in December 1791. Only recently in *Reid* v. *Covert*, 354 U. S. 1, 1 L. Ed. 2d 1148 (1958), this Court cautioned against unconstitutional seizure of power by the military, and said (pp. 23-24):

"The Founders envisioned the army as a necessary institution, but one dangerous to liberty if not confined within its essential bounds. Their fears were rooted in history. They knew that ancient republics had been overthrown by their military leaders."

And again at pages 39-40:

"The attitude appears to be that a slight encroachment (by the Army) on the Bill of Rights and other safeguards in the Constitution need cause

> little concern. * * * but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure.".

Congress has been sedulous in guarding property rights even in wartime. During the debate on the Requisitioning Act of 1941 (Conference Report of June 30, 1941), Hon. Merwin K. Hart complained:

> "There has been a tendency the past eight years, not only in the federal but in most of the state governments, to take too lightly those rights of the people that are known as property rights. I submit that these inalienable rights, the enjoyment of property, built up over a thousand years, ought not to be thrown away, or even placed in jeopardy, by a stroke of the pen."

The property rights of our citizens, we submit, have, indeed, been placed in jeopardy by the decision of the Court below.

The adjudication by this Court of this fundamental question is, we submit further, of great importance in our modern world. Transportation today makes it possible for our citizens to own property, reached in a few hours, in many places on the globe. Our far-flung military establishments are a new phenomenon in our national life, and as a nation we find it necessary to the preservation of our security to maintain American forces in 63 foreign countries. The Army may find desirable such property of our citizens, just as Mrs. Seery's property was found, and in this very case the Court below held that the constitution follows the flag and the United States is responsible to its citizens for property requisitioned by the Army in foreign countries, other than enemy countries. The respective responsibilities of the Army and of the U. S. citizen-owners should be clearly defined, and the procedure to be

taken by the commanding officers on requisition should be fixed by this Court.

The absolution to the Army granted by the Court below, if permitted to stand, would have disastrous and far-reaching consequences.

As to Question B: In reaching its conclusion that Mrs. Seery's missing property may not have been present in 1945 and that it had the "impression" only a small fraction had come into the Army's hands (A. 5, 7), the Court below consistently disregarded uncontradicted testimony of the Government's own witnesses on direct examination, or elicited on cross-examination, that Mrs. Seery's property was present and had been used by the Army. Five instances are set out in the "Statement" above, in paragraphs "9", "10", "11", "13", and "14". In order to avoid repetition, petitioner respectfully requests that said paragraphs be again examined in connection with this Question B. Petitioner will not attempt to relate the numerous other instances, but deems it necessary to refer briefly to a further few in support hereof.

It must be remembered that Mrs. Seery had not a single witness of her own who could testify as to what had been taken by the Army; her sisters and family living ten minutes away were barred from the premises and thus disabled by the Army from making an inventory for her own requisition. To prove her damages, Mrs. Seery had to rely completely on the Government's witnesses and the Army records.

1. The Court below disregarded the report of the Government's witness Captain Clayton to the FBI (Pl. Ex. 93, page 2; Tr. 1951, 1954) and his testimony on direct examination (Tr. 1733) that he saw the maid replacing labels on Oriental rugs with labels bearing the name of the Army's hostess, which the maid informed him the Army's hostess had instructed her to do; and the testimony of the Government's witnesses Jaeger (Tr. 532-3, 538) and

Dr. Wotruba (Tr. 694, 699) that the Army hostess had in July 1946[8] sold 20 Oriental rugs to the art dealer Jaeger in Mondsee and had sent a further quantity to Vienna to be sold; and the testimony of the Army hostess, who admitted on cross-examination that she had brought with her from Dr. Gyssling's Los Angeles home only 2 Oriental rugs (Tr. 1563)—plus 2 Bokharas which she did not sell (Tr. 538). No inquiry was made by the commanding officer as to Mrs. Boone's suspicious conduct (Pl. Ex. 93, p. 4). Clearly, the rugs in question were the property of Mrs. Seery.

Furthermore, the Court found (A. 24, F. 34) that Mrs. Boone had made an inventory in July 1945 of *all* of Mrs. Seery's rugs then in House #100, despite the direct testimony of Mrs. Boone (Tr. 1542) that this was only a *partial* inventory. Mrs. Seery claimed $33,080 for the loss of her 37 rugs.

2. The Court below disregarded the testimony on direct examination of Mrs. Wotruba that Mrs. Seery's fine silverware, with the initials "M. P." and crest, silver decorations and silver dinner plates were seen on the table at the dinner party for General Copeland (Tr. 750) but that she thought the silver was Mrs. Boone's or the Gyssling's. However, Mrs. Boone admitted on cross-examination that she had allegedly brought with her from Gyssling's Los Angeles home only a set of silver flatware, a tea service and coffee pot, and a tray (Tr. 1561-2, 1630)—no silver dinner plates or table decorations. Captain Clayton testified that he had only removed from the locked silver trunk flat silverware (knives, forks, etc.) for 12 (Tr. 1815). How then could silver decorations and silver dinner plates that had been locked in the three trunks appear on the Army's table? The Government's witness Novacek also testified that certain silver pieces and serving

[8] Mrs. Boone, the Army's hostess, was removed in August 1946 by Assistant Secretary of State Peterson, on the complaint of Mrs. Seery's former attorneys. (Def. Ex. 1—Pretrial Memo.)

trays were used by the Army (Tr. 402). She said "just a few". But how could even "just a few" have got out of the locked trunks to which only Mrs. Seery had the keys (Tr. 1141)? Captain Riley described a large silver tray in use by the Army belonging to Mrs. Seery (Tr. 1976). There were many old pieces of petitioner's valuable silver services (other than flatware) still in use by the Army in July 1946, as evidenced by the Army's 1946 inventory (See Appendix B).

The locked silver trunk, which Captain Clayton admits was opened by him, was found in the attic of House #100 in an unlockable condition in July 1946 and listed by him (Pl. Ex. 7, Item 927) as filled with old lamp parts. A second silver trunk was found in the bathhouse of House #100, in an unlockable condition, and listed by Riley together with other trunks and suitcases (Pl. Ex. 7, Item 1001). One of the velvet chests which Mrs. Burianstassig (Tr. 170, 180) testified were used by Mrs. Seery to contain flat silverware in the dining room of House #100, was listed by Riley in 1946 (Pl. Ex. 7, Item 1004), found in the bathhouse.

On her return in 1948, Mrs. Seery recovered in cupboards and in a box in House #100 much of her silver which had been placed in her three locked trunks (See Appendix B; also Petition for Rehearing, p. 49).

Despite the above evidence, the Court found erroneously that Captain Clayton had opened the trunk, removed one-tenth of its contents, and left the trunk in the custody of Mrs. Seery's caretaker, in her house and that it is not the law[9] that the Army became responsible for the remainder left in the opened trunk (A. 7); that the

[9] This is not the common garden variety of case where a cupboard is opened and articles removed. In the instant case, we have a locked trunk, the keys of which Mrs. Seery had taken with her to America, evidencing her wish to deny access to everyone. The act of opening this locked trunk, exposing its contents—even to the caretaker—and leaving it in an unlockable condition, constituted an ouster of Mrs. Seery's possession and assertion of control by the Army.

silver could not possibly have disappeared from the caretaker's room, without petitioner's caretaker or her sister knowing of it, and that, although they are dead, no hearsay evidence was offered to show what became of it (A. 6). Petitioner did not know hearsay evidence was acceptable to the Court, and immediately made a motion for rehearing showing by affidavits that the Army discharged Speigner, the caretaker, and compelled him to leave the premises because of his complaints that the Army had gradually removed all of Mrs. Seery's silver; and that her family were barred by the Army from House #99 as well as House #100 (Petition for Rehearing, pp. 45-9, 56-7, 72-8, 90-2).

For the silver lost Mrs. Seery claimed $82,320.

3. The Court disregarded the testimony of the Government's own witnesses describing Mrs. Seery's fine china dinner services and crystal sets and other objects which were used by the Army (see Appendix B). One of the Government's witnesses, Mrs. Wotruba, went so far as to make a drawing, on direct examination, of Mrs. Seery's tulip-shaped glasses which she saw in use by the Army (Def. Ex. 54, Tr. 749-50). The fact is that odd cups and saucers and plates of all but two sets claimed were found by Mrs. Seery on her return in cupboards in House #100 —just as had been reported by Captain Riley in his inventory (Appendix B, Petition for Rehearing, p. 23). Petitioner claimed $22,707 for the loss of her china and crystal.

4. The Court below found that plaintiff had not proved damage to her garden (A. 39, F. 60), thus disregarding the uncontradicted testimony of the Government's witnesses that over 1,000 young men used the landscaped garden of this private home, during a two-year period, for baseball and horse-shoe pitching and other sporting activities (A. 23-4, F. 32).

On the other hand, undue weight was given to the alleged inventories of the German Authorities, which had been

carefully preserved by the Government (A. 15-7, 19-21, F. 18, 19, 20, 25, 26, 27). Said inventories were incomplete, misleading, and had no probative value whatsoever, inasmuch as they did not come near to reflecting the items listed in the Army's July 1946 inventory. Those dated May 1944 (Def. Exs. 46 D-E, Tr. 709-10, 650-51) contained 15, and that dated June 1945 (Def. Ex. 47, Tr. 652) contained 8 letter size, widely spaced pages, respectively; as compared with the Army's July 1946 inventory of 25 legal size, single-spaced pages (Pl. Ex. 7).

There was one other notable error by the Court which should be commented upon, made in disregard of the records of the Government and—this time—uncontradicted testimony of Mrs. Seery's witness. The Court's opinion (A. 7) states "if we were frankly told" about the silver used at Cinda Wachtl's wedding, etc. Cinda Wachtl testified that she and her mother borrowed flat silverware for her wedding in September 1946 from an American officer at House #100 (Tr. 2012-6, 2038), and that this was returned by her mother and the servant Mrs. Vollbauer (Petition for Rehearing, pp. 38, 71, 77, 99-100, and affidavit of Mrs. Vollbauer). The borrowed silver—MPJ and crest—was listed in the Army's July 1946 inventory (Pl. Ex. 7, last page), and was accounted for after the wedding in House #100 at the time of the check-out of said inventory in July 1947. Otherwise its absence would have been noted by Captain Riley and the Bank-Administrator (A. 25, F. 37).

Inasmuch as Mrs. Seery was disabled from making an inventory of her own and the Army failed to do so, full weight should have been given to the uncontradicted testimony and records of the Government in her favor; the intendment should, it is respectfully submitted, have been against the defendant.

As to Question C: The well established rule is that, where private property is taken for public use, title passes to the Government *eo instanti*, and it is no concern of the owner as to what use or purpose the Government puts it

or whether the property perishes in its hands or disappears. *Walker* v. *U. S.*, 34 C. Cls. 345, *Salomon* v. *U. S.*, 19 Wall 17 (86 U. S. 17, 20). Yet the Court of Claims, in its Findings #57, 59, 60, 31, 47 (A. 38-9, 23, 31), reversed this rule. Mrs. Seery is not concerned with whether the Army authorized its personnel to loot her property, and does not have to furnish evidence that it was destroyed or removed; she does not have to prove how the Army might have shipped or otherwise disposed of it—or the extent of its use—while barred from the premises.

That this ruling is sound is well pointed up in this case, where the petitioner had not a single witness and had to rely on the testimony of the Government's witnesses, most of whom were on the defensive because of their misdeeds, hostile to petitioner, and biased. Mrs. Seery was further handicapped in that an American officer in uniform, accompanied by a former Nazi SS man and interpreter, appeared in the small village, inquiring about testimony to be given.[10] The townspeople, who were conditioned to fear under the Nazi domination, were thoroughly intimidated; no one would appear for Mrs. Seery against the United States, particularly since the U. S. Army was occupying that section of Austria while the hearings were in progress. (Petition for Rehearing, pp. 53-54.)

As to Question D: This question deals with the suppression of inventories made by the Army. The Government was the sole custodian of the records pertaining to requisition of the property, and produced a massive file of exhibits. However, no Army inventory was ever produced by the Government, Mrs. Seery producing the Army receipt and inventory furnished to her in September 1946. She had no knowledge of any other Army inventories.

Captain Clayton testified that on requisition he made a one-page inventory, and turned it over to his superior of-

[10] Tr. 527-9, 603-15; 616-8; 17-8; 25; 100; 473-9; 258-9; 266-9; 494-6; 543, 552-4.

ficer, Major Munson (Tr. 1739-40, 1764-7). This was never produced (A. 24, F. 34). Nor was there produced the papers which Captain Clayton testified he signed when he turned his command over to his successor officer, a Major of the 91st Division, Special Service Officer, who then made his own inventory (Tr. 1742, 1817, 1838). That an inventory was made during Clayton's tenure was corroborated by Sergeant Worrell, his aide (Tr. 1919), and Mrs. Boone, the Army hostess (Tr. 1574, 1616).

Captain Clayton was succeeded by Lt. Ball, Lt. Billy Brown, Lt. Edwards and Lt. Riley (now Captain Riley)—A. 24, F. 33, 34. Captain Riley testified he took over from Lt. Edwards in the latter part of July 1946 (Tr. 1966-7), that he was handed an inventory made by a predecessor—which was not produced—and that, in accordance with Army regulations, he prepared his own inventory and receipt on the forms provided, which was checked on derequisition (Tr. 1962). It was Riley's inventory and receipt that was sent to Mrs. Seery, and produced by her herein (Pl. Ex. 7).

Captain Clayton and Captain Riley were the only commanding officers produced by the Government.

No testimony was given by a witness on behalf of the Government to show that a thorough and diligent search had been made for the missing inventories and that none could be found.

The failure of the Government to produce such inventories, evidenced by the testimony of all four of the Government's witnesses able to give testimony on the point, warrants the inference that said inventories, if produced, would have listed all of Mrs. Seery's property and would have been favorable to her. Silence then becomes evidence of the most convincing character.[11]

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[11] *Interstate Circuit, et al.* v. *U. S.*, 306 U. S. 208, *Clifton* v. *U. S.*, 40 How. 243, 247. *Runkle* v. *Burnham*, 153 U. S. 215, 225; *Alpirn* v. *U. S.*, 124 C. Cls. 670, 675.

As to Question E: It is a fundamental principle of equity that no one can take advantage of his own wrong or failure. *Honk* v. *Karlsson*, 292 P. (2d) 455, 80 Ariz. 30. It has been held that the doctrine of estoppel[12] will be applied against governmental bodies where justice and right require it. *Sawyer* v. *City of San Diego*, 292 P. (2d) 233.

The Court below erred, it is respectfully submitted, in not finding that the Army's misconduct in disabling Mrs. Seery from making an inventory and in failing to make one for more than a year after requisition—or suppressing those made—formed the basis for an estoppel.

As to Question F: The Court below found that Mrs. Seery suffered damages in 1945 and was entitled to recover therefore $10,000 (A. 7-8). The Court, however, arbitrarily limited interest thereon to an additional $1,000 as part of just compensation. It is respectfully pointed out that the Courts have universally found 4% to be a reasonable rate of interest to be added as compensation for delay in payment and to offset to some extent the costs of litigation.

The litigation expenses incurred by Mrs. Seery in her attempt to collect just compensation have been horrendous. Travel expenses of counsel to Europe, California and Washington, were necessitated by the insistence of the Government on oral testimony rather than depositions. Printing costs and the expense of transcribing testimony (in this case over 2,100 pages) have virtually placed justice beyond the reach of an individual litigant. Yet in this case, although it was found that Mrs. Seery suffered damage and was deprived of her property in 1945, less than 1% of annual interest was allowed.

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[12] "Equitable estoppel, in the modern sense, arises from the conduct of a party, using that word in its broadest meaning, as including his spoken or written words, his positive acts, and his silence or negative omission to do anything. Its foundation is justice and good conscience." 2 Pom. Eq. Jur. Sec. 802." *Mahoning Investment Co.* v. *U. S.*, 78 C. Cls. 231, 245.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

GUSTAVE I. JAHR,
Counsel for Petitioner.

January, 1959.

APPENDIX A

IN THE

United States Court of Claims

No. 340-52

(Decided May 7, 1958)

MARIA JERITZA SEERY v. THE UNITED STATES

Mr. Gustave I. Jahr for the plaintiff.

Mr. Kendall M. Barnes, with whom was *Mr. Assistant Attorney General George Cochran Doub*, for the defendant.

OPINION

MADDEN, *Judge*, delivered the opinion of the court:

The plaintiff sues for just compensation for the taking by the Army of the United States of her real and personal property.

The plaintiff was a resident of Austria until 1935, in which year she became a resident of the United States. She became a citizen of the United States in 1944. Beginning in 1921, she began to come to the United States each year to sing at the Metropolitan Opera in New York, where she was a star of the first magnitude. At some time before 1929 she acquired three properties at Unterach am Attersee in Austria. The property with which this case is directly concerned is a castle-like villa located on a lake and surrounded by mountains and forests. It is property No. 100. Property No. 99 is across the road from No. 100, and is a guest house accessory to No. 100. Property No. 125 is, like No. 100, a lake front villa some ten minutes walk from No. 100. A large addition to No. 100 was completed in 1930, as was the extensive remodeling of the old part of the house.

The two villas were used only in the summer months, No. 100 and its guest house by the plaintiff, and No. 125 by her two sisters, Mrs. Wachtl and Mrs. Krones, residents of the Sudetenland in Czechoslovakia, and their families.

In 1935, upon removing her residence to the United States, the plaintiff gave up a large apartment which she had occupied for some years in Vienna. She caused the furnishings of the apartment to be packed for shipment and had some of them shipped to the United States. The greater part were, however, shipped to Unterach, to be placed in house No. 100. The plaintiff then went to Unterach and made an inventory of the contents of house No. 100, including, however, only those things which had already arrived there out of the Vienna apartment. Many of the things sent from Vienna had not yet arrived at Unterach.

Among the boxed things that had arrived when the plaintiff was at Unterach was a trunk full of silver. It contained numerous sets of sterling table silver. The trunk was placed in house No. 100. The plaintiff had the trunk opened and the trunk and its contents moved across the road to house No. 99 and placed in the room of the plaintiff's caretaker, Mr. Speigner. The trunk was repacked and locked. Perhaps two other boxes or trunks of silver were placed in the same room.

After about two weeks at Unterach, the plaintiff caused house No. 100 to be locked up, gave the keys to the caretaker, returned to Vienna and a few days later started for the United States. From that time in 1935 the plaintiff never returned to Unterach, or to Austria, until 1948.

So far as appears, the caretaker faithfully cared for the property. The gardens, which had been beautifully planted, mostly with roses, when the plaintiff was using the property, may have been maintained during the earlier years. There is some evidence, by no means conclusive, that in 1941 a unit of the German Army occupied the property. If this occurred, the house and its contents were not visibly disturbed, since witnesses for the defendant testified that they saw things in apparent good order inside the house as late as 1943.

In 1944 the Nazi authorities took possession of house No. 100, first as a nurses' training school and shortly after that as a hospital for unmarried mothers. Prior to this occupancy, Mrs. Wachtl, the plaintiff's sister, caused the furniture from many rooms of No. 100 to be removed to No. 99 and stored in one or two rooms there.

In 1941, when the United States and Germany each sent home the consular officials of the other, Dr. Gyssling, the German consul at Los Angeles, who was a friend of the plaintiff, secured her permission for his daughter, Angelica, and his housekeeper to live in No. 99 at Unterach. The housekeeper, Mrs. Boone, was an American citizen of German birth. She and Gyssling's daughter went to Unterach. Later No. 99 was taken by the German authorities as a shelter for refugees, and Mrs. Boone and Angelica lived in No. 125, the Wachtl villa.

About June 1, 1945, the Wachtl family, who were refugees from the Czechs, succeeded in getting to Unterach. There was a quarrel between them and Mrs. Boone about the right to occupy No. 125, a number of Mrs. Boone's relatives and other persons who had fled from Vienna having taken residence there with her. The German authorities required Mrs. Boone to move out and the woman in charge of the hospital in No. 100 allowed her and her sister-in-law and Angelica to sleep on the floor in that house.

About the middle of June 1945, Captain Clayton, whose duty it was to locate sites for rest centers for enlisted men and officers of the 65th Division, United States Army, came to Unterach. He was referred by German officials to Mrs. Boone as a possible interpreter. When he went to find Mrs. Boone, he discovered house No. 100 as a desirable rest home for officers. He recommended it to his superiors and it was taken for that purpose. The hospital moved out a few days later. The house was renovated, necessary repairs were made by labor furnished by the Burgomeister, the furniture which had been stored in No. 99 was replaced in No. 100. Mrs. Boone was employed as housekeeper and supervisor; she hired the necessary servants; Captain Clayton and a sergeant resided in the house.

The Army remained in possession until June 30, 1947. Until the spring of 1947, the house was used as a rest center for officers up to and including the rank of captain. They came in groups of from 10 to 20 at a time, and stayed for about a week. Every other night there was entertainment by musicians and other entertainers obtained from the area. There were dances, and there was drinking to the extent that might have been expected. There was fishing, boating, swimming, horseshoe pitching, ping-pong and attempts at baseball. During the last few months of the American occupancy, the house was used primarily as a rest center for staff officers of the rank of colonel and above. Only about fifteen such officers used the rest home. One or two of them at a time, with their wives and children and members of their staffs, would come for a week-end.

In January 1946, the American Military Government for Austria appointed an Austrian bank as the administrator of house No. 100 and its contents. On July 11, 1947, after the Army had ceased to use the property, it released it to the custody of the bank. As we have seen, the plaintiff returned to her property in August 1948, released the publicly appointed administrator and made her own arrangements for the future care of her property.

The plaintiff claims that large numbers of highly valuable items in the line of silver, chinaware, crystal, pictures, rugs, linens, tapestry and furniture were destroyed or stolen during the American occupancy of the house. That occupancy covered only two of the thirteen years that the plaintiff was out of touch with her property.

The plaintiff has fairly well persuaded us that most of the things for which she sues were on the property in 1935, and had disappeared by 1948. That, of course, is only a short step in the direction of persuading us that the things were still there in 1945 and had disappeared by 1947.

Most of the missing valuables were relatively small objects, dishes, silver, porcelain decorative pieces, pictures, rugs, etc. They could have been carried off very easily by anyone who had access to them. Probably many of them

would, if they had been there, have been carried off by the perhaps thousand or more young officers who made use of the rest home. We think, however, that not many of these objects were in house No. 100 when the Army took possession of it.

When Captain Clayton set about to make the house ready for visitors, he sent for dishes from a nearby factory or army supply depot. He would not have done so if the closets had been stacked with sets of dishes such as the plaintiff claims to have lost. The same is true of the bed sheets, table linen, blankets, etc. Several inventories were made of the contents of the house. They were made by different persons; they described room and objects by different designations; they are hard to reconcile with one another; but none of them come near to including all of the types of things, or the numbers of the things, which are claimed by the plaintiff. Some of the closets may have been locked, at some of the periods of time, but some of the china and glassware closets had glass doors, and their contents would have been visible.

The plaintiff urges that since the Army, upon taking possession of the property, did not make an official inventory, and give the plaintiff a receipt for the property taken, it is in no position to contest the plaintiff's claim that what was there in 1935 was there and was taken in 1945. The Army's failure to do, or to cause the German authorities to do, what international law wisely requires when property is taken, does make its position somewhat more vulnerable. But when, as in this case, there is evidence of the happening of events which disturbed the 1935 status of the property, and evidence, which we believe, of the fact that the most of the property in question was not present in 1945, and hence was not taken, there would be no justification for penalizing the Government for not making an inventory and giving a receipt, by making it pay for property which we think it did not get.

We have referred to the trunk of silver which the plaintiff, in 1935, placed in the room and the custody of her

caretaker. In 1945, Captain Clayton, having obtained some army tableware which was not up to the standard of an officers' rest home, learned about the plaintiff's silver. With a good deal of formality and over protests of the plaintiff's caretaker and her sister, the needed pieces of silver were carefully counted out and receipted for. The receipt given indicates that three days later some additional pieces were taken and receipted for. There is no oral testimony as to the circumstances of this second taking. The plaintiff says that that left in the caretaker's room in house No. 99, nine-tenths of the contents of the trunk that was opened, and two other unopened trunks or boxes of silver. All of that silver is alleged to have disappeared, except possibly a few casual items such as trays, and the plaintiff says that the Government should pay for all of it. But there is no evidence that the Army ever had it. Both the plaintiff's caretaker and her sister, though they died before the trial in this case, were alive when the plaintiff returned to her house in 1948 and investigated the disappearance of her belongings. The silver could not possibly have disappeared from the caretaker's room in house No. 99 which was never occupied by the Army, without their knowing what became of it. Yet no evidence is offered, even in the nature of hearsay, on the subject.

A large amount of the plaintiff's silver was used at the wedding supper when the plaintiff's niece was married at Unterach in 1946. The trial commissioner of this court made the following finding:

> • • • Plaintiff has acknowledged that the silver used at the wedding was recovered in 1948, • • •.

The plaintiff took no exception to this finding. She asked only that the following finding be made:

> This silver was given to Cinda Wachtl and her mother by an American Officer, and a receipt was given to the Officer.

Cinda Wachtl testified not only that it was given to her by an American officer at house No. 100, but that it was returned to the officer after the wedding, all in 1946. Yet the plaintiff recovered it in 1948, a year after the Americans had left the scene. If we were frankly told from whom and under what circumstances the wedding silver was retrieved, it might throw much light upon the problem of the disappearance of much of the plaintiff's property.

The plaintiff takes the position that the Army, having caused the trunk to be opened, and having taken and receipted for some of the silver, became responsible for all the silver, no matter who stole it. That is of course not the law. The Army never took possession of any of the silver in the trunk or in the room except what it receipted for. The rest of it remained in the possession of the plaintiff, in her house and in the care of her designated custodian.

On the whole case, a study of the evidence gives no answer to the question of what became of the plaintiff's possessions. We have the impression that a relatively small fraction of them came into the possession of the Army. Even that small fraction, however, would have had a considerable value, since the plaintiff's things were luxurious and expensive. There were accurate inventories made at the beginning and the end of the second year of the Army's occupancy, and those inventories showed a considerable loss by breakage or disappearance of objects. The first year of occupancy would have involved much more use of the plaintiff's things, with proportionately more breakage and disappearance. The house no doubt had hard usage during the occupancy.

We think a considerable amount of the plaintiff's personal property was lost or destroyed while in the Army's possession, and that considerable damage was done to her house. Without any pretense of accuracy, and treating the question as a jury would have to treat it, we conclude that the plaintiff may recover ten thousand dollars.

The Government raises anew the questions which we considered and decided when we denied its motion for a summary judgment. *Seery* v. *United States*, 130 C. Cls. 481. We adhere to the views expressed in that opinion.

The plaintiff is entitled to recover eleven thousand dollars, which amount includes any interest which might be payable as a part of just compensation, and judgment will be entered to that effect.

It is so ordered.

LARAMORE, *Judge*; WHITAKER, *Judge*; LITTLETON, *Judge*; and JONES, *Chief Judge*, concur.

FINDINGS OF FACT

The court, having considered the evidence, the report of Trial Commissioner Wilson Cowen, and the briefs and arguments of counsel, makes findings of fact as follows:

1. Plaintiff is a citizen of the United States, was naturalized in 1944, and has resided in the United States since 1935. She was born in Austria but came to the United States in 1921 and annually thereafter until 1932 to sing at the Metropolitan Opera in New York. Plaintiff married Baron Leopold Podraphy in 1919; that marriage was dissolved in 1934. In 1935 she married Winfield Sheehan, an American citizen who was president of Twentieth Century Fox-Film Corporation. After Mr. Sheehan's death in 1945, plaintiff married her present husband, Irving P. Seery, who is an American citizen. Plaintiff is a loyal American citizen.

2. Plaintiff owns certain real property and the houses thereon in Austria at Enterach am Attersee. The properties are designated as premises nos. 99, 100, and 125. No. 125 is located at some distance from the other two properties and is not directly involved in this action. Plaintiff has been the owner of record of the three properties since their acquisition prior to 1929.

Plaintiff did not rent her properties and they have never been used by her for commercial purposes.

3. The property known as no. 100, or the Haus am See, is a castle-like house which is beautifully located on a lake and surrounded by mountains and forests. It contains from 20 to 24 rooms, including three or four bathrooms. At all times pertinent to this suit, there were also located on the property a boathouse, a garage, a bathhouse, and a small garden house enclosed on three sides. The house had electricity, central heating, and modern plumbing.

No. 99, known as the Stoeckl, is a guesthouse containing nine rooms and is located across the street from the Haus am See.

Property no. 125, known as the Wachtl Villa, is located at some distance from the other two houses. It consists of nine rooms and was occupied during the summer months by plaintiff's sisters, Risa Wachtl and Susie Krones, and members of their families. Risa Wachtl died in 1954.

4. The Haus am See consists of a new main house and an old house. The new house and the remodeling of the old wing were completed in 1930.

In 1931, plaintiff employed a landscape architect to landscape property no. 100 and, under his direction, 250 rose bushes, 20 conifers, and hundreds of flowers were planted on the premises. There were also two palm trees which were set in boxes so that the palms could be brought into shelter in the winter.

5. For two or three months during each summer from 1930 to 1935, plaintiff occupied the Haus am See. It was luxuriously furnished with antique-style furniture, oriental rugs, figurines and other objects of art, pictures, paintings, silver, chinaware, crystal, and a considerable quantity of fine linen. Although most of the furnishings consisted of reproductions, there were a number of antique pieces.

While she resided at the Haus am See during the summers, plaintiff frequently entertained royalty, prominent persons, and close friends as her guests. Her dining room could seat 24 people, and buffet suppers for as many as 100 guests were served on the terrace from time to time. An annual party was also given for about 200 children from the village and the town officials who accompanied them.

6. Until September 1935, plaintiff maintained an apartment consisting of 12 rooms in Vienna, Austria. It was furnished in the same manner as the Haus am See.

7. Sometime in September 1935, plaintiff closed her apartment in Vienna and shipped part of her personal property contained therein to the United States and the remainder to Unterach. She and her secretary then spent about two weeks at Unterach, returned to Vienna, where they resided in a hotel for a short time, and left for the United States in October 1935.

No inventory was made of the goods shipped to the United States. The invoices plaintiff paid to a moving and storage company at the time show that on September 24, 1935, three vans of furniture were transported from Vienna to Unterach, and that on the next day one van of furniture was moved from plaintiff's apartment to a warehouse. Between September 26 and September 30 of the same year, the mover picked up at the Hotel Bristol, where plaintiff stayed temporarily, eight boxes, three packages, and four suitcases. No rugs or silver were shipped to the United States. Among the goods shipped to the United States were a piano, a dining room set, a bedroom set, about ten figurines, and a few personal articles which were not described.

8. During the two weeks she spent at Unterach in September 1935, plaintiff and her secretary made an inventory in the German language of her personal property in house 100. The inventory included a portion of the goods that

had arrived from Vienna before plaintiff's departure from Unterach, but the evidence does not show how much of the shipment from Vienna was on hand at the time the inventory was made. One of the invoices in evidence is a charge for moving one van of furniture from Vienna to Unterach in July 1936, after plaintiff had returned to the United States.

Included in the shipment that arrived from Vienna before the inventory was taken was one trunk containing silverware. Plaintiff also packed the silverware which had been in use in the Haus am See, in two other trunks, and all three trunks of silver were then stored in the bedroom of the caretaker in the guesthouse. The remainder of plaintiff's personal property was left in the Haus am See.

The inventory made by plaintiff and her secretary consisted of 20 or 25 pages in two copies. One copy was left in plaintiff's boudoir in the Haus am See, and she took the other with her to the United States. The 1935 inventory was not a detailed and complete description of plaintiff's property in such terms as appear in the amended schedule to plaintiff's petition. The inventory was made for plaintiff's purposes and did not list the dimensions of the furniture, the sources from which the various articles were obtained, the purchase prices, or values thereof.

Neither the original nor the copy of the 1935 inventory was offered in evidence. Plaintiff did not have copies of the inventory made in 1948 when she used it to prepare a claim against the defendant. On November 30, 1948, while she was residing in the United States, plaintiff's automobile was broken into and a brief case containing a copy of the inventory and other valuable papers was stolen. A report was made to the police about the robbery, and the incident was described in a newspaper story on December 1, 1948.

9. When plaintiff left Unterach in 1935, the house was closed and locked. It was equipped with heavy exterior doors, and the windows were protected by steel shutters and wrought iron grills.

Plaintiff left the keys to the Haus am See with Hans Speigner, her caretaker, who occupied rooms in the guesthouse. To assist the caretaker, plaintiff also employed a housekeeper, who was given a key to the main entrance of the Haus am See, and who slept in a room on the first floor. Plaintiff had planned to return the following summer, but she stayed in the United States until August 1948, when she returned to Unterach.

10. Plaintiff's sisters lived in Bruenn, Czechoslovakia, but they and members of their families occupied the Wachtl Villa in Unterach in the summer months from 1935 to 1945, when they moved permanently into the villa. However, from some time in 1944 until June 1, 1945, Mrs. Boone, named hereinafter, and her family and friends occupied the Wachtl villa. At the end of each summer when the plaintiff's sisters returned to Czechoslovakia, they locked the villa and left the keys with Speigner, the caretaker.

11. On September 23, 1935, before she left Unterach, plaintiff contracted with a local architect and builder to erect an addition to the Haus am See in the form of a tower. It consisted of a bar downstairs with a bedroom, bathroom, and closet above. This addition to the property was completed on or about July 1936.

12. It may be that at some time in 1941, a unit of the German Army occupied some or all of the Haus am See. If this occurred, it seems not to have disturbed or damaged the house or its contents and furnishings.

13. During 1936 in Los Angeles, plaintiff became acquainted with Dr. Georg Gyssling, German Consul in Los Angeles, his thirteen-year-old daughter, Angelica, and Mrs. Christine Boone, who served as Dr. Gyssling's housekeeper and as nurse for his daughter.

When Dr. Gyssling returned to Berlin in July 1941, during the exchange of consuls, his daughter and Mrs. Boone

traveled with him. Before their departure they informed plaintiff that Dr. Gyssling had no home in Germany, and plaintiff granted them permission to occupy rooms in the guesthouse at Unterach. At the same time, plaintiff wrote a letter to her sister, Risa Wachtl, informing her of the prospective arrival of Dr. Gyssling, Angelica, and Mrs. Boone, and stating that they were to have the use of rooms in the guesthouse (property no. 99). Mrs. Boone was an American citizen. However, she made this trip to Germany on a German diplomatic passport.

After their arrival in Europe, Dr. Gyssling remained in Berlin, but Mrs. Boone and Angelica proceeded to Unterach and moved into rooms in the guesthouse about August 1, 1941. At that time, the Haus am See was not occupied.

Neither Mrs. Boone nor Dr. Gyssling was given authority to act as plaintiff's agent or in her behalf while in Unterach, nor were they authorized to reside in any of her properties except the rooms in the guesthouse. In December 1941, a problem arose regarding the payment of the local taxes due on plaintiff's property, since it was no longer possible for plaintiff to transmit funds to Austria. On December 20, 1941, Dr. Gyssling addressed a letter to the District Court of Upper Austria, stating that plaintiff had requested him to raise funds for the payment of the taxes but that, since she was a foreigner, money could not be loaned in her behalf without special permission. Therefore, he suggested that Dr. Leo Wachtl, plaintiff's nephew, be appointed guardian of the property in order that he might obtain the funds needed for the payment of the taxes by mortgaging the property. Thereafter, on January 27, 1942, the court issued a decree appointing Dr. Wachtl as guardian of plaintiff's three properties in Unterach.

14. In the summer of 1942, Dr. Gyssling, his daughter, and Mrs. Boone moved into the old wing of the Haus am See. Dr. Gyssling had learned that the German Gauleiter in Linz was about to seize the property. Also, at that time

there was a great influx of war refugees from eastern Europe into Unterach, and many of them were billeted in private homes by orders of the municipal authorities. By moving into the house, Dr. Gyssling hoped to forestall its occupancy by soldiers or refugees. Plaintiff's sister, Mrs. Risa Wachtl, gave Mrs. Boone the keys to the old wing, but the new wing remained locked with the keys in the possession of Mrs. Wachtl.

Dr. Gyssling stayed in Unterach for only two or three months at a time. However, Mrs. Boone and Gyssling's daughter resided in the old wing of the main house from the summer of 1942 until sometime in 1944. During Mrs. Boone's residence there, her mother, her brother, and her sister-in-law also lived or stayed in the old wing of the house for varying periods of time.

15. During the summers of 1942 and 1943, while plaintiff's sisters were residing in Unterach, they frequently entered the Haus am See with plaintiff's caretaker and had him remove boxes and crates, containing personal property belonging to plaintiff, to the Wachtl Villa. The record does not show what articles were contained in the boxes and crates.

16. On March 18, 1943, an administrator for plaintiff's properties in Unterach was appointed by the German Alien Property Custodian. In 1944 the new wing of the Haus am See was requisitioned by the Germans and used as a nurses' training school.

17. After a short period of use as a nurses' training school, the Nazis occupied and used the new wing of the Haus am See as a maternity home for unmarried mothers. With an increase in the number of patients, the maternity home took over the old wing of the house in the spring of 1945, and thereafter occupied the entire house until about July 1, 1945. Hospital beds and hospital equipment were moved into the house, and at least one of the rooms was converted into an operating room in order to provide com-

plete hospital facilities for the care of the mothers and children.

18. On May 10, 1944, while Mrs. Boone and Angelica lived in the old wing of the Haus am See, the German Office of Public Welfare at Linz caused an inventory to be taken of the personal property located in the old wing. The inventory was signed for the owner by Mrs. Wachtl, and for the Office of Public Welfare by one Schroeder, as well as by Mrs. Boone.

On May 15, 1944, the German Office of Public Welfare at Linz also caused an inventory to be taken of the personal property located in the new wing of the house, and this inventory was signed for the owner by Mrs. Wachtl and for the Office of Public Welfare by Schroeder.

The Office of Public Welfare had also, on May 6, 1944, taken an inventory of the contents of the Wachtl Villa, but there is no proof as to whether an inventory was made at that time of the contents of the guesthouse (property 99).

19. Although the record is not entirely clear on this point, the evidence leads to the conclusion that two inventories covering the contents of the Haus am See in May of 1944 (hereinafter referred to as the May 1944 inventories) were taken just prior to the occupancy of the new wing by the nurses' training school and the maternity hospital. In the two inventories, the several items listed are described in general terms sufficient to identify each item by its nature and type but not sufficient to distinguish any article from others of the same kind. The inventories listed the contents of the house room by room, and no specific reference was made therein to the presence of the various dinner sets, china, crystal, and fine linen which were left in the house when plaintiff departed from Unterach in 1935. However, the references to closets with various glasses and porcelain and silver items indicated the presence of some such things, without any indication of the number of them.

In the May 1944 inventory covering the new wing, the following articles were listed at the locations shown:

Staircase Landing

5 Wood boxes, nailed shut.
1 Wood box, nailed shut.
1 Large trunk, locked.
10 Pictures.
1 Chest of drawers, locked. (marked "belongs to Mrs. Wachtl")
1 Box, full, closed.
1 Large trunk.

Hallway

8 Suitcases, locked.

Hallway-Behind Kitchen

2 Wood boxes, full, nailed.
3 Silver trays.
2 Silver vases, with blue glass.
3 Upholstered chairs.
1 Three-section closet with various glasses and porcelain items.
1 Closet with various glasses and silver items.

Hall

(In addition to other items, the listing includes the following:)
5 Pictures.
22 Slipcovers for furniture.
5 Various mirrors
56 Pictures
2 Wardrobes, locked. (marked "Mrs. Wachtl")
10 Various paintigns

20. Sometime during 1944, Mrs. Wachtl moved some of plaintiff's furnishings from the Haus am See and stored them in one or two locked rooms in the guesthouse. A comparison of the May 1944 inventories with an inventory taken in June 1945, leads to the conclusion that this furniture was stored in the guesthouse after the 1944 inventories were taken but before the nurses' training school and the maternity hospital occupied the new wing of house 100. There was no inventory of the furnishings moved to the guesthouse, and the identity of the rooms on the second floor of house 100 from which furniture was removed cannot be determined from the evidence. However, the following described furnishings were contained in the downstairs rooms of house 100 on May 15, 1944, and such furniture was not in the three rooms in June 1945:

Blue Drawing Room

1 White leather Chaise lounge
2 Carpets
1 Bedside carpet
8 Coco carpets
4 Coco rugs
6 Various small tables
3 Bedside tables
2 Flower stands
2 Flower stools
1 Sofa
1 Heavy table
1 Candelabra
8 Upholstered chairs
1 Upholstered stool
1 Round table
1 High record-player
1 Three-fold wardrobe, with various china and glass decorations
3 Upholstered chairs
1 Chair
3 Sofas
3 Bed sets
4 Various mirrors

Area between the Hall and the Blue Drawing Room (Dining Room)

1 Large round table
1 Round table
20 Upholstered chairs
4 Iron chairs
2 Round tables
2 Upholstered chairs
1 Upholstered chair
1 Couch
1 Large painting
1 Painting
1 Chaise lounge
5 Flower stools
1 Large record-player
1 Small cabinet
1 Desk
1 Candelabra

Bar

1 Desk
1 Small table
1 Music stand
1 Small cabinet
1 Small, oval, basket table
5 Chairs
1 Upholstered chair
1 Long cane chair
1 Long cane chair, with cushion
11 Cane chairs, upholstered
1 Heavy chair, upholstered
1 Upholstered chair
3 Upholstered stools
2 Large mattresses
2 Mattresses (3 parts each)
3 Mattresses
5 Window cushions

21. In the spring of 1945, the officials of the maternity home demanded that Mrs. Boone and Angelica vacate the old wing in order that the hospital could use the entire house. They moved from the house and the municipal authorities assigned them living quarters in the Waehtl Villa in 1944 or 1945. They were not able to obtain rooms in the guesthouse, because all of its rooms, except the caretaker's quarters and the room or rooms in which plaintiff's furniture was stored, were occupied by war refugees.

22. American Forces, consisting of a troop of mechanized cavalry, first reached Unterach about May 12, 1945, and were quartered in one of the inns there for a period of about one month. The troops did not occupy or use any of plaintiff's three properties. Mrs. Boone informed the commanding officer that the Haus am See belonged to plaintiff, an American citizen, and requested that the house be placed under United States custody. The officer referred her to another Army official in Linz, Austria, to whom she repeated her request in the latter part of May or early June 1945.

23. On June 1, 1945, the Wachtls returned to Unterach, and took possession of the Wachtl villa. The villa was then occupied by Mrs. Boone and her relatives and friends. There was a controversy between Mrs. Boone and the Wachtls as to the occupation of the villa. The Wachtls had come from a refugee camp where they had been mistreated by the Czechs, in retaliation for the mistreatment of Czechs by the Germans. The Burgomeister ordered the Boone party out of the villa. The nurse in the maternity home assigned sleeping space to Mrs. Boone, her sister-in-law, and Angelica Gyssling in the dining room of the Haus am See. All the other rooms were occupied by patients and personnel of the maternity hospital.

24. About the middle of June 1945, Captain Prentiss Clayton, a Special Service Officer of the 65th Division, United States Army, who was attempting to locate sites for rest centers for enlisted men and officers of the division, came to Unterach. He was unable to speak German and was referred to Mrs. Boone as a possible interpreter. When he called on her, he inspected the Haus am See, and reported to his superior that it was large enough to meet the division's requirements as a rest center for officers. Three or four days later, he returned to inquire from the German doctor in charge of the maternity hospital when the hospital could vacate the house and ascertained that the

house would be available in a few days. When this fact was communicated to his superior, the Army decided to use the house as a rest center for officers. At that time, the Army did not have a property control or real estate office in that area of Austria, and no requisition forms were available. The situation with respect to the organization of the 65th Division was about the same as had prevailed during combat. The Army took possession of property 100 as soon as the maternity hospital moved out. The exact date when this occurred is not established by the record, but it was about July 1, 1945. The Army employed Mrs. Boone as housekeeper for the rest home.

25. About the time the Army decided to use the Haus am See as an officers' rest center but prior to the removal of the German maternity hospital, Mrs. Boone and her sister-in-law made an inventory of the contents of the Haus am See, the guesthouse, and the Wachtl Villa. These inventories listed the property by the rooms in which it was located in the same manner as had been done in the May 1944 inventories. The May 1944 inventories of the contents of the Haus am See were used as a basis for making the 1945 inventory, the earlier inventories being checked against the actual contents of the house to determine what was present and what was missing. Pencil marks were made on the 1944 inventories to show whether particular articles were still on hand or were missing, but the evidence regarding these pencil notations is so vague and ambiguous that no accurate determination can be made as to what articles had disappeared between May 1944 and the latter part of June 1945.

The 1945 inventory did not list the contents of the drawing room, dining room, and bar, which were then in use by the maternity home. However, the inventory contained a notation to the effect that the furniture that had been in these rooms was stored in the guesthouse. The 1945 inventory likewise did not include the contents of five rooms on the second floor, which rooms were still being

occupied by the maternity hospital at the time the inventory was taken. With respect to the five rooms, the inventory stated that the furniture that had formerly been in these rooms was stored in the guesthouse and in the bathhouse.

26. No reference was made in the 1945 inventory to the locked trunks, locked chest of drawers, wooden boxes (nailed shut), and the other articles which are described in finding 19 above. There is no proof as to what happened to such property between the time the 1944 inventories were taken and the date on which the 1945 inventory was made.

27. After the German maternity hospital vacated the Haus Am See, Captain Clayton moved into the house and employed Mrs. Boone as housekeeper and general supervisor during the period of the American occupancy. Since a number of the rooms were unfurnished, Captain Clayton directed Mrs. Boone to secure the assistance of the mayor of the town in obtaining furniture for these rooms. Thereupon, Mrs. Boone obtained from Mrs. Wachtl the keys to the room or rooms in the guesthouse, filled completely with the plaintiff's furnishings that Mrs. Wachtl had previously removed from house 100 and stored in the locked room. Under Mrs. Boone's direction, the furniture and furnishings were moved back into house 100.

Although the testimony of defendant's witnesses who prepared the 1945 inventory (defendant's exhibit 47) is to the effect that the inventory was made after the furniture had been removed from the room in the guesthouse, the inventory itself and other documentary evidence are in conflict with this testimony. From the record as a whole, it is concluded that the furniture was removed from the room in the guesthouse after the 1945 inventory was made, and that no separate inventory was made at that time of the furniture moved from the guesthouse to house 100 and used during the period of occupancy. The furniture taken from

the guesthouse at that time did not include any silver, china, or glassware. However, four or five boxes containing china, glassware, linen, and kitchen utensils belonging to plaintiff were found in the attic, and the contents of the boxes were used during the period the house was operated as an officers' rest home.

28. Captain Clayton learned that an American general expected to arrive at the Haus am See on July 17, 1945. In preparation for his coming and in order to make the house habitable as a rest center, the Army employed local workmen to make a number of repairs to property 100.

The kitchen, staircase, and a number of other rooms inside the house were painted. The terrace was whitewashed. One stove was mended and the other stoves were cleaned out and put in order. The heating plant was worked on in order to provide a supply of hot water. The floors were cleaned, scraped, and painted. During the time the maternity hospital used the property, some electrical wiring had been installed on the outside surface of the walls, and this was placed inside the house.

A number of rotten floorboards in the boathouse were replaced, and the boathouse was painted. A broken railing in the bathhouse were placed and a window was reglazed. The bathhouse was cleaned. The swimming pier, which had rotted out through long exposure to water, was completely rebuilt, and a diving tower was installed on it. The diving tower but not the pier was later removed by the Army.

The flower garden which plaintiff had had planted in the area between the house and the lake in 1931 had either been largely removed or died through lack of care during the period of occupancy prior to the coming of the Americans. While the maternity hospital was in possession of the premises, part of the garden had been used for raising vegetables, and the remnants of the vegetable patch existed when the Army took possession of the premises. All of the rosebushes and other flowers, the palm trees, and all

the remaining plants with the exception of a few large trees and some shrubs had disappeared. The vegetable patch was removed by the Army, the walkways were graveled, and some effort was made to keep the remaining shrubs, trees, and grass alive.

29. The quantity of plaintiff's china and glassware found in the attic was not sufficient for the needs of the rest home, and most of the china and glassware used in the rest home was obtained from an Austrian manufacturing plant.

30. The silver tableware which was used when the Army first occupied the Haus am See consisted of a small quantity of silver which was loaned for that purpose by Mrs. Boone. It was not adequate to meet the needs of the rest center. Captain Clayton learned from Mrs. Boone that some of plaintiff's silver was stored in the guesthouse. Mrs. Wachtl, who had the keys to the guesthouse, was sent for and admitted Captain Clayton and Mrs. Boone into the caretaker's room in which a trunk containing silverware belonging to plaintiff was stored. At Captain Clayton's direction, over Mrs. Wachtl's protest, and after the caretaker Speigner's refusal to open it, the trunk was opened, and some 301 pieces of silver, mostly flatware, including knives, forks, and spoons, were removed on July 13, 1945, and taken to the Haus am See for use by occupants of the rest center. The silver was engraved with a crest and the initials "M. P." At the time the silver was taken, Captain Clayton and Mrs. Boone signed a receipt describing the silver, and this was given to Mrs. Wachtl. The evidence shows that when the Army ended its occupancy of the house a good many pieces of the silverware were missing.

There is no proof that defendant's representatives removed any additional silver belonging to plaintiff from the trunk, except that a notation on the receipt indicates that three days after the taking on June 13, 36 additional pieces may have been taken, although the quantity of tableware

taken by Captain Clayton amounted to only about one-tenth of the silver contained in the trunk at the time. When Mrs. Wachtl's daughter was married in Unterach in 1946, a complete silver service belonging to plaintiff was used at the wedding. The silver bore the same crest and initials as that removed from the trunk in July 1945 by Captain Clayton. Plaintiff has acknowledged that the silver used at the wedding was recovered in 1948; and no claim has been made for it in the schedule filed as an amendment to the petition on April 30, 1956.

In July 1945, when the above-described silver was removed from plaintiff's trunk in the caretaker's room in the guesthouse, the two additional trunks containing silverware which plaintiff had stored in the same room in September 1935, if they were still in the room, were not molested. We do not know what happened to the two additional trunks of silverware.

31. In addition to the plaintiff's kitchen utensils, which were found in a box in the attic, the kitchen utensils used by the Army during the operation of the rest center consisted of brown enameled ware of the German Army type. There were a considerable number of sheets, pillowcases, and blankets belonging to plaintiff in the Haus am See when the Army took possession of the premises. The evidence does not show to what extent plaintiff's blankets and linens were used by defendant, but the Army obtained bed linen from Quartermaster stores and required each guest to provide his own towels. Most of the blankets used by the visitors in the rest home were of Army issue.

32. The Haus am See was in use as an Army rest center from July 17, 1945 to June 30, 1947.

Captain Clayton remained in charge of the rest center until about October , 1945. While he was there, property 100 was used as a rest center for officers of company grade, i. e., up to the rank of captain. They came in groups of from 10 to 20 young officers, and each group

stayed for about a week. On alternate nights during the week, entertainment was provided by musicians and other entertainers obtained locally. Dances were held. Alcoholic beverages were consumed by the officer-guests, but there is no evidence of excessive drinking.

While they were at the center, the officers engaged in fishing, boating, and swimming in the lake. They also pitched horseshoes, played ping-pong, and tried to play baseball.

From the spring of 1947 until the Army vacated the property 100 on June 30, 1947, the house was used primarily as a rest center for staff officers of the rank of colonel and above. There were about 15 such officers. On week-ends, one or two of them, with their wives and children and members of their staffs, visited the house.

33. When Captain Clayton left Unterach about October 1, 1945, Lt. Ball of the 91st Division became the officer in charge of the Haus am See, and on April 5, 1946, he was succeeded by Lt. Billy Brown of the 42nd Division. About July 1, 1946, Lt. Robert Riley of the 42nd Division became the responsible officer in charge and remained in that position until after the Army vacated the premises.

34. On July 16, 1945, Mrs. Bo[illegible]e and her sister-in-law made an inventory of all of plaintiff's rugs that were then in the Haus am See.

There is some evidence that Captain Clayton made a one-page inventory of the personal property in the house after he took up residence there about July 1, 1945, but if such an inventory was made it was not found or offered in evidence. No other inventory of plaintiff's personal property in the house was made by any agent of the Army until July 1946.

35. On January 11, 1946, the Military Government, a part of the Army organization in Austria, appointed the Bank of Upper Austria and Salzburg, hereinafter called the Bank, as the administrator of house 100 and all con-

tents thereof. On April 5, 1946, the Haus am See was formally requisitioned by the Army.

The Bank did not have access to the house during the period of Army occupancy, but in July 1946, a representative of the Bank visited the premises and, with the assistance of Lt. Riley and Mrs. Boone, made a complete inventory of all of plaintiff's personal property that was then located on property 100. The location of each article was shown and every item was numbered.

36. On July 11, 1947, the Army released the property 100 to the custody of the Bank. On that date, a representative of the Bank and Lt. Riley carefully checked the 1946 inventory against the personal property then on hand. With the exception of 164 pieces of broken china and glassware, it was determined that all of plaintiff's property which was listed in the July 1946 inventory was in the house or other buildings on the property on July 1, 1947. Thereupon, the Bank's representatives signed a form accepting custody of the property covered by the inventory. The Bank also appointed one Polzer, who had previously been employed by the Army, as caretaker of plaintiff's property and he served in that position until November 1, 1948.

37. When the July 1946 inventory was taken, a good many pieces of the silver taken by Captain Clayton from plaintiff's trunk in the guesthouse were missing. On July 11, 1947, all of plaintiff's silver that was included in the July 1946 inventory was in the Haus am See.

38. Plaintiff was furnished a copy of the July 1946 inventory. Written notice was given to plaintiff by headquarters of the Army in Austria that property no. 100 was no longer required for Army use and that possession would be returned to her effective July 1, 1947.

39. The Army did not occupy the guesthouse (property no. 99) or the Wachtl Villa at any time pertinent to this action.

40. On November 29, 1947, the Bank, as administrator of plaintiff's property, filed with the Office of War Damages of the Province Government of Upper Austria a claim in the sum of 28,610 Austrian schillings for damages arising out of the occupation of house 100 by American troops from April 5, 1946 to July 1, 1947. 9,500 schillings were claimed as the restoration cost of three damaged paintings, and 19,110 schillings were requested as compensation for the breakage of 164 pieces of china, crystal, and glassware.

The letter transmitting the claims stated that the owner had given notice to the Army that she reserved the right to claim damages incurred during the period prior to April 5, 1946. The above-described claim represented the Bank's determination of the damage to and loss of plaintiff's personal property that was caused by the American occupation during the period between July 1946, when the Bank's representative, Lt. Riley, and Mrs. Boone made the inventory of plaintiff's personal property, and July 11, 1947, when the Bank's representative again checked the inventory against the property on hand and accepted custody thereof from Lt. Riley.

41. Plaintiff returned to Unterach with her husband early in August 1948, and on or about August 4, 1948, they packed a large quantity of plaintiff's personal property in boxes and crates for shipment to the United States. They made an inventory of the packaged and crated goods, which included articles which plaintiff had removed from the Wachtl Villa (no. 125), and the guest house (no. 99), which properties were not under the administration of the Bank, as well as articles from house 100. The inventory made by the plaintiff and her husband and signed by both was entitled "Inventory of Household Goods, Furniture and Works of Art owned by Mrs. Maria Jeritza Seery in Houses in Unterach am Attersee, Upper Austria." The articles were packed and the inventory was made outside the presence of any representatives of the bank and outside the presence of the caretaker whom the bank had

appointed for property no. 100. The necessary export papers were obtained from the Austrian Minister of Finance, and all of the personal property listed in the inventory (in evidence as defendant's exhibit 36) arrived in the United States about March 17, 1949; and was unpacked in October 1949.

42. Early in August 1948, and at about the same time defendant's exhibit 36 was prepared, plaintiff and her husband also made an inventory of the contents of house no. 100, which personal property she intended to leave and did leave in the house in Unterach after her departure about August 17, 1948. The caretaker appointed by the Bank later checked this inventory against the personal property left in the house, and on August 15, 1948, a representative of the Bank acknowledged receipt of a copy of the inventory, in evidence as plaintiff's exhibit 37-A.

Also, at or about the same time the above-described inventories were made, plaintiff and her husband made an inventory of the contents of the guesthouse (no. 99) that were to be left and were left there after she returned to the United States. This inventory was checked against the property on hand by one Hoffman, a caretaker appointed by plaintiff. The Bank also acknowledged receipt of a copy of the document, in evidence as plaintiff's exhibit 38-A.

43. The inventory of goods plaintiff shipped to the United States (defendant's exhibit 36) listed 2,687 articles, and the inventory of the property left in house 100 in August 1948 (plaintiff's exhibit 37-A) contained 892 pieces, a total of 3,249 pieces. The inventory of July 1946, made by a representative of the Bank, Lt. Riley, and Mrs. Boone (plaintiff's exhibit 7), listed 1,007 numbered items, representing 2,357 pieces. That inventory did not list the contents of boxes, trunks and suitcases, but only the containers.

44. On August 9, 1948, Mr. Landzettel, a representative of the Bank, in company with an officer of the Property Control Office of the Army, visited plaintiff at Unterach. When Mr. Landzettel learned that plaintiff had removed many articles of her personal property from the rooms where it had been located in house no. 100 and had packed these articles in the boxes with personal property that she had removed from the Waeth Villa and the guesthouse, he protested that this action had been taken without notice to the Bank and stated that the Bank, which was responsible for the inventory of her personal property in house 100, had desired to release the property covered by the Bank's inventory to plaintiff before the property was removed from the rooms described in the inventory. The boxes and crates containing the property shipped to the United States were not closed at that time. No move was made by Mr. Landzettel or the American property control officer to unpack, or examine the contents of, the boxes. Copies of the inventory of the goods shipped were given to the Bank and to the moving company which handled the shipment.

Mr. Landzettel again visited plaintiff at Unterach on August 16, 1948, and advised plaintiff that the Bank wished to be released as administrator of her property and to be relieved from responsibility for the personal property which had been in its custody. On the same day, plaintiff wrote the Bank the following letter:

> To-day I transferred S 35,000.—(thirty-five thousand) to my administrative account at your bank of which amount you are to pay immediately the loan of the Sparkasse Linz. The rest is to be used to pay for taxes and expenses arising during the current and next year and the salary of the caretaker.
>
> At the same time I wish to inform you that I ordered CID to take care of the finding and bringing back of those articles which were lost during the time when the house no. 100 requisitioned by U. S. troops [sic.]
>
> In connection with this, I certify that when I arrived I found all articles which you took over from the

American Real Estate as per inventory, in full order. The losses and theft ocurred [sic] before 1 July 1947. I kindly ask you, especially Mr. A. Landzettel, who is most familar [sic] with the administrative matters here, to assist the CID as far as possible.

Yesterday I informed a Mr. Mackenzie of Property Control Branch and Mr. Landzettel of your bank of all my wishes regarding the continued administration.

On the following day, plaintiff wrote another letter to the Bank, which was also dated August 16, 1948, and stated:

I ask you to return my letter, dated 16 August 1948 which was handed over to you by Mr. Landzettel, to my address in New York and to disregard it.

In regard to the inventory I inform you that I have sent the entire inventory which I found in a desolate state, to America.

I leave it up to the authorities to check the completeness of the inventory on hand of the various inventory lists. When I left my property in 1935 it was in an accurate state. I reserve my right for any further claim and will inform you of such steps.

. . . . . .

45. On August 9, 1948, plaintiff had informed a representative of the Army Office of Property Control that a great deal of her personal property was missing as a result of the Army's occupancy of the Haus am See. The Chief of Property Control refused to accept responsibility for the loss, stating his office had no control over the property until after the house was vacated by the Army. However, plaintiff's complaint was referred to the Criminal Investigation Division, and two of its representatives visited her on August 16, 1948, in company with Mr. Landzettel of the Bank. Plaintiff informed them that when she departed from Unterach in 1935, her property had been left in the custody of her nephew, Leo Wachtl; that the Haus am See had been luxuriously furnished, and that a great many articles of her personal property were missing

when she returned in August 1948. Plaintiff stated that her personal property was spread all over Unterach and declared that two of her rugs were in the possession of Dr. Wotruba, a brother of Mrs. Boone, who had visited the latter on several occasions during her residence in house no. 100. She also said that some of her property might have been taken by Dr. Gyssling and that the largest portion of the missing property may have been removed by Mrs. Boone, who left Unterach for the United States in August 1946. The representatives of the CID advised plaintiff that they could not recover any stolen property without a complete inventory of the articles which she had left in her houses in Unterach. Plaintiff replied that, in view of the lapse of so many years, she could not remember exactly what the articles were or what some of them looked like, but that she believed she had a complete inventory that was taken in 1935 of the contents of house no. 100, and that upon her return to the United States, she would mail a copy of the inventory to the CID.

During the same conversation, plaintiff told the CID representatives that an American Army captain and Mrs. Boone had broken open one of plaintiff's trunks and removed silver therefrom.

As stated in a subsequent finding, plaintiff did not send a copy of her 1935 inventory to the CID or other representative of defendant.

46. During her conversation with the agents of the CID, plaintiff stated that she was returning to the United States on the following day, but she named a friend in Unterach who would be able to identify any of her property that might be found.

The representatives of the CID made a thorough search of Dr. Wotruba's premises and also searched the store of a local antique dealer to whom Mrs. Boone had delivered some rugs for sale. A few days later a search was also made of Dr. Gyssling's home. None of plaintiff's property was found at any of these locations, and the CID

eventually closed its file because of its failure to find any any evidence of larceny.

47. When plaintiff returned to Unterach in August 1948, she found that all three of her properties there were badly in need of repair. The condition of the buildings was due in part to the fact that, aside from the work done by the Army, no repairs had been made to the properties since 1935, but some of the repairs were necessitated by the damage done to house no. 100 by the various occupants thereof. On August 4, 1948, plaintiff had a local builder make an estimate of the cost of the repair work needed for all three properties. His written estimate stated that the sum of 24,852.60 Austrian schillings would be needed for the repair of house no. 100 and that an additional 8,267 schillings would be required for the repair of the boathouse. At plaintiff's direction, he proceeded with the work and in September 1948, he wrote plaintiff that an additional 7,339 schillings were needed for the repair of the roof. The record does not show when he completed the job on the three properties, but on June 12, 1950, he signed a receipt showing that plaintiff had paid him in full for the costs as estimated.

Included in the amount paid for work on the Haus am See were repairs to the roof, chimney flashings, and gutters; painting of the buildings; replacement of rotten boards in the boathouse, and the dismantling and packing of four ceramic stoves. The evidence does not establish how much of the amount plaintiff expended for the repair work was necessitated by damage done by the various occupants of the house after 1935, and how much was due to the fact that no repair work had been done for 13 years.

48. On September 15, 1948, the War Damages Division of the Government of Upper Austria awarded the sum of 3,573.07 schillings on the claim of 28,610 schillings which the Bank had submitted on November 29, 1947; and offered to pay that amount to the Bank upon its execution of a release.

By reply of September 22, 1948, the Bank stated that after it had informed plaintiff of the amount awarded, she had instructed the Bank to refuse the offer and to request that her claim be reexamined. The reply also pointed out that the Bank could not sign the release, because it had expressly reserved plaintiff's right to claim additional damages.

49. On October 26, 1948, the builder with whom plaintiff had contracted in August 1948, to repair her three properties, prepared and sent the Bank an estimate in the sum of 46,719.60 schillings for the restoration of property no. 100. He described the estimate as a "List of restoration costs of here mentioned damages to Buildings and objects, occuring [sic] during the time of occupation by American troops from the time of June 1, 1945 to July 1, 1947." There is no competent evidence to establish what part of his estimated restoration costs was due to the occupation of the property by the Army and what part was due to other causes. His estimate of the costs of restoration included a number of jobs to be done that were not listed in the statement of repair work he furnished plaintiff on August 4, 1948.

On October 27, 1948, the Bank submitted a claim of 46,719.60 schillings for damages to the house and other facilities on property 100 to the Office of War Damages of the Government of Upper Austria. The claim was based upon and was accompanied by a copy of the builder's estimate of October 26, 1948.

50. No award was made in 1948 on the claim which the Bank had submitted for damages to the real property. However, as a result of the Bank's request for reconsideration of plaintiff's claims, a representative of the Office of War Damages of the Government of Upper Austria made an inspection of property 100 on May 2, 1949. When the inspection was made, some of the repairs which plaintiff had contracted for in August 1948 had been completed.

On the basis of the inspection report, an official of the Office of War Damages of the Government of Upper Austria determined that the amount of plaintiff's indemnification for the loss of and damage to her personal property should be increased from 3,573.07 schillings to 4,214.10 schillings and that an award of 4,786.50 schillings should be made for damages to the buildings—both amounts on account of the American occupation. The total amount so determined was 9,000.60 schillings. By a decree of August 23, 1951, the Austrian authorities fixed the sum of 12,614 schillings as the amount to be awarded to plaintiff in satisfaction of both her claims. The evidence does not show how much of the award was for damages to personal property and how much was for damages to the real estate.

On October 12, 1951, Ernst Koller, an artist's agent and concert manager, wrote the Office of Finance of the Government of Upper Austria, stating that he was the authorized agent for the artistic and financial interests of the plaintiff and that she had compiled a claim in the amount of 75,539.60[1] schillings as compensation for the damage to her real and personal property because of the American occupation during the period from April 5, 1946 to July 1, 1947. The letter further stated that the writer had discussed the award of 12,614 schillings with plaintiff and that she "does not conceive that she shall be dismissed with a bagatelle of S 12,000.00 for a damage which was done to her and for which she had to spend the demanded sum in cash." The letter concluded with the statement that if the Austrian authorities did not settle plaintiff's claim she would place it in the hands of her attorney in America. In a reply of October 20, 1951, the Austrian District Director of Finance wrote Mr. Koller that the decree of August 23, 1951, by which plaintiff had been awarded 12,614 schillings, could not be increased. With respect to the amount awarded, the reply also stated: "As to the instant case, there is not involved full compensation of

[1] This was the total of two claims filed in behalf of plaintiff by the Bank.

damages but rather an indemnity paid not by the American Occupation Power but by the Austrian State." When he testified at the trial, the writer of the letter explained the meaning of the quoted statement by saying that the Austrian authorities had made the award of 12,614 schillings on the basis of the 1945 values of the property, plus additions of 50 percent in some instances.

The award made by the Austrian authorities was not paid to or accepted by plaintiff. As stated in a subsequent finding, plaintiff filed a claim directly with the Army, and thereafter decided to bring this action when she learned that the Army had referred the claim to the Austrian authorities.

51. At the time the Americans occupied plaintiff's property and at the time the Austrian authorities made the award to plaintiff, as described above, the rate of exchange of the Austrian schilling was ten to the dollar.

52. In May 1948, plaintiff had been notified that the Army Office of Property Control in Austria desired to release all property of allied nationals to agents appointed by the owners, and stated that where the owner appointed no agent, the property would be turned over to Austrian authorities for administration as "absent owners property".

On receipt of the information, plaintiff wrote the Army on August 15, 1948, as follows:

> In connection with the three houses and the property therein which I own in Unteraich, May I request of you
>
> 1. That the United States Army, now in control, continue its control, as I think that would insure better propection [sic] and guardianship.
> 2. That the United States Army initiate an investigation as to what has become of the property taken and now, I believe, lodged in private houses and hotels and elsewhere, as the Army can do it better than any other agency.

Inasmuch as the Army took it in custody, I would like it to continue, and, as far as possible, restore it in the same condition with all its contents.

If the Army does not continue its control, I am faced with the possibility of the Austrian Governments taking over, with no assurance of competent or diligent supervision by the agent it selects; and I have not the alternative of appointing a local Bank, as they do not undertake such work.

The caretaker of the property, Mr. Fritz Polzer and Mr. Landzettel of Linz, have the necessary information as to the location of the missing property.

I have spoken at length with Major Howard A. Mackenzie of Linz of Civil Affairs Property Control and he is familiar with all the details.

* * * * * *

In response to plaintiff's request, the Office of Property Control agreed to retain the property under its control, the Bank continuing as administrator for an additional period of 60 days, with the understanding that plaintiff would appoint an attorney to act for her in her absence and to accept the property when it was released. During the latter part of October 1948, plaintiff appointed Alfred Landzettel as her agent to accept custody of the property, and on November 9, 1948, the property was released by the Army to Mr. Landzettel, and the Bank was discharged as administrator.

53. Plaintiff returned to New York from Austria about September 2, 1948. Shortly thereafter, plaintiff with the assistance of her secretary, who had been with her for 25 years, prepared a detailed schedule of a claim for the loss of and damages to her real and personal property in Unterach. The claim, which was submitted to the Department of the Army by her attorney on June 29, 1949, requested compensation in the amount of $597,419 for loss of and damage to plaintiff's personal property in houses 99 and 100, $18,000 for the rental of house 100 for three years,

and $4,671 for damages to the main house and boathouse on property 100.

The claim was dictated to a stenographer, and the detailed descriptions of the articles, their dimensions, the dates of acquisition, the sources from which the articles were obtained, and the values thereof, were supplied by plaintiff or her secretary. In preparing the claim, plaintiff used a copy of the inventory which she had made in Unterach in 1935 and which she found upon her return to the United States in 1948. However, with respect to the articles which were shipped from Vienna to Unterach in 1935 after plaintiff's departure and which were not listed in the 1935 inventory, plaintiff relied on her memory. She attempted to exclude from the claim the articles of personal property which she had found and inventoried in Unterach in 1948, including both the property shipped to the United States and that left in house 100 in 1948. As stated above, the claim was filed with the Army on June 29, 1948, and in January 1950, plaintiff and her secretary executed affidavits in support of the claim, and the affidavits were also sent to the Department of the Army.

The goods plaintiff shipped from Unterach in August 1948 arrived in New York on March 17, 1949, and were stored in two private garages in New Jersey. Early in October 1949, plaintiff moved into a house in Newark, New Jersey, unpacked the goods, and discovered that they included a number of articles of personal property that had been listed in the claim filed with the Department of the Army. The failure to exclude the articles from the claim was due to differences in the terminology used in describing the articles in the 1935 inventory from the descriptive language used in the 1948 inventories. Plaintiff did not inform her attorney of this discovery until sometime afterward. When her petition in this suit was filed on June 30, 1952, the articles referred to were omitted from the schedule attached to her petition. After a further comparison of the articles of personal property shipped to the United States in 1948 with those listed in the schedule to the peti-

tion, plaintiff filed an amended schedule to her petition on April 30, 1956, and at that time further reductions in the number of articles claimed were made.

54. As stated in finding 8, plaintiff's copy of the 1935 inventory covering part of the personal property she left in houses 99 and 100 in Unterach in 1935, was stolen on November 30, 1948. During approximately three months, while this inventory was in plaintiff's possession after she returned to this country, and before it was stolen, plaintiff did not copy, or otherwise have the inventory duplicated, nor did she mail a copy thereof to the Criminal Investigation Division of the Army in Austria as she had agreed to do when interviewed by representatives of that organization on August 16, 1948. She discussed the matter with her attorney, and since she had prepared a claim which was thereafter filed with the Department of the Army, it was decided not to send a copy of the inventory to the CID.

55. On August 28, 1949, plaintiff was advised that the claim which she had filed against the Army had been referred to the Government of Austria under the terms of the Austro-American Agreement of June 21, 1947. Plaintiff protested this action, and thereafter on June 27, 1952, her attorney notified the Department of the Army that she had elected to withdraw the claim and to institute this suit.

56. In Amended Schedule A to the petition, plaintiff claimed the sum of $257,843.10 as the reasonable value of the personal property in houses 100 and 99. She alleged that such personal property was lost or destroyed while houses 99 and 100 were requisitioned, occupied, and used by the military forces of the defendant from July 1945 to July 1, 1947. A complete list of the personal property for which such compensation was sought is set forth in Amended Schedule A to plaintiff's petition. Since the trial, plaintiff has determined that a number of the articles

listed in the schedule were recovered by her and has requested that the amount claimed in the schedule be amended to reduce the claim for loss of personal property to the sum of $241,843.83.

While the Haus am See was occupied and used by the Army as a rest center, a good many pieces of plaintiff's silver flatware were lost, and a good many articles of plaintiff's china, crystal, and glassware were broken or lost.

57. There is no proof that the Army authorized its personnel to appropriate or destroy any of plaintiff's personal property, and except as stated in finding 56 above, there is no evidence that any of the contents of the house 100 belonging to plaintiff was removed or destroyed by members of the Army. The Army regulations in effect at the time the Haus am See was used as a rest center required each member of the Army to obtain a bill of sale or a paid receipt for any article of personal property before it could be shipped from Austria to the United States. The parcel to be shipped could not be accepted at the post office until the bill of sale or receipt was displayed there, and the regulations also required that the receipt be placed inside the package before it was wrapped and mailed.

58. Plaintiff makes no claim for the damage to the three paintings described in the claim filed with the Austrian authorities by the Bank (finding 40).

59. In Amended Schedule B to her petition, plaintiff claims the sum of 40,458.60 schillings, or $4,045.86, for damages caused to the Haus am See and the boathouse by the Army during its occupation and use of the premises. The amount claimed is the sum which plaintiff paid to the local builder in 1948 for the repairs described in finding 47. There is no satisfactory or convincing evidence showing what portion of the amount plaintiff spent for repairs was required by reason of the damage caused by members of the Army during the operation of the rest home. The builder's estimate of the costs paid by plaintiff shows on

the face thereof that some of the work done was due to the fact that the property had not been repaired for 13 years rather than to damage caused by the occupants of the premises.

60. In item "C" of Amended Schedule B to plaintiff's petition, the sum of 77,000 schillings, or $7,700, is claimed as the restoration cost, including landscaping services, of the garden which plaintiff had planted on property 100 in 1931. As stated in finding 28, the garden, including all of the flowers and most of the shrubs, had died through lack of care or had been removed prior to the time the Army took possession of property 100. There is no satisfactory proof that the garden was damaged as a result of the occupation and use of the property by the Army.

CONCLUSIONS OF LAW

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that the plaintiff is entitled to recover, and it is therefore adjudged and ordered that she recover of and from the United States eleven thousand dollars ($11,000.00), which amount includes any interest which might be payable as a part of just compensation.

APPENDIX B

Evidence of Use by the Army of Petitioner's Missing Belongings

Uncontradicted Testimony of the Government's Witnesses—Listings in the Army's Inventory of Odd Pieces—Petitioner's Recoveries of Odd Pieces of Missing Items

Amended Schedule A, Record, pp. 58-67 Item No.	
1-8	Furniture All furniture was recovered, except the 10 heavy pieces and 2 small pieces itemized in Amended Schedule A
9	China and Crystal Plaintiff recovered 1 piece: "1 Soup Tureen Meissen China" (Plff.'s Ex. 37, p. 6, line 9, Tr. 341, 1288).*
16	Tr. Riley, p. 1977 Riley reported 8 pieces thereof: Pltf.'s Ex. 7, Items #651, 757 Plaintiff recovered 7: Def. Ex. 36, p. 9, line 2, Tr. 483
18	Riley reported 4 pieces: Pltf.'s Ex. 7, Item 698 Plaintiff recovered 5 pieces: Def. Ex. 36, p. 9, line 1; p. 10, line 27
21 & 10	Riley reported 3 pieces: Pl. Ex. 7, Items 678, 679, 684 Plaintiff recovered 2 pieces: Def. Ex. 36, p. 7, 9th and 10th lines from bottom

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*Proportionate credit was given in her findings for all pieces recovered by Mrs. Seery, even though odd pieces recovered of once complete sets have mere negligible value. *Claim is made for the unrecovered pieces.*

All pieces recovered by her were found in the cupboards, closets, and in boxes in House #100. (Petition for Rehearing, pp. 23-24.)

The reporting of such pieces in the Army's inventory and recovery by petitioner is strong presumptive evidence that the full sets were used as claimed.

Amended Schedule A, Record, pp. 58-97 Item No.

22 & 11 — Riley reported 74 pieces: Pl. Ex. 7, Items 27, 159, 286, 600, 601-5, 608-9, 622, 624, 627, 692, 704
Plaintiff recovered 81 pieces: Def. Ex. 36, p. 5, last 5 lines; p. 6, lines 1, 5

23 & 12 — Tr. Riley, p. 1979
Plaintiff recovered 29 pieces: Def. Ex. 36, p. 10, line 46; Pltf. Ex. 37, p. 5, lines 27-29

24 & 13 — Tr. Riley, p. 1976; Boone, p. 1642; Wotruba, p. 749. A drawing was made by Mrs. Wotruba (Def. Ex. 54)
No piece was recovered

25 — Plaintiff recovered 144 pieces: Def. Ex. 36, p. 7, lines 18-38

26 & 14 — Tr. Brauneis, p. 514; Riley, p. 1980; Wotruba, p. 749; Boone, p. 1638
Riley reported 90 pieces: Pl. Ex. 7, Items 635, 639-40, 652-4, 660, 662, 667, 669, 677
Plaintiff recovered 90 pieces: Def. Ex. 36: p. 7, line . . ; p. 8, lines 1-3, 5, 6, 9, 10, 17-20

27 & 15 — Tr. Riley, p. 1979
Riley reported 89 pieces: Pl. Ex. 7, Items 636, 638, 641-4, 647, 655-6, 664, 666, 670-3, 675, 680, 756
Plaintiff recovered 89 pieces: Def. Ex. 36, p. 8, lines 21-3, 25-8, 32, 34-7, 40-1, 43-5, 50

28 & 19 — Plaintiff recovered 25 pieces: Def. Ex. 36, p. 9, lines 39-42, in a box in the attic of House #100, reported by Riley as marked "Gla-Porzellan" Pltf.'s Ex. 7, Item 951

Amended Schedule A, Record, pp. 58-97 Item No.	
29 & 20	Plaintiff recovered 78 pieces: Def. Ex. 36, p. 9, lines 12-25, found in a box in the attic of House #100, reported by Riley as marked "Porzellan" Pltf.'s Ex. 7, Item 988
30	Riley reported 1 set of bottles: Pl. Ex. 7, Item 76 Plaintiff recovered 1 set: Def. Ex. 36, p. 4, line 15
31 & 144	Riley reported 23 miscellaneous vases: Pl. Ex. 7, Items 35, 685-6, 834-5, 840, 844-5, 847-8, 852, 856-60, 862-3 Plaintiff recovered 28 miscellaneous vases, which included 6 of those claimed: Def. Ex. 36, p. 4, lines 47-8; p. 5, line 1, p. 10, line 31
32	None was recovered
33	1 plate was recovered: Def. Ex. 36, p. 7, line 2
	As to Silver*
39	1 basket was reported by Riley: Pl., Ex. 7, Item 611 Plaintiff recovered 8 of her original 12 silver baskets and four other baskets: Def. Ex. 36, p. 2, lines 25-6, 38-40; p. 3, lines 25, 40, 45; p. 6, line 27; p. 9, line 26. Plaintiff, however, did not recover the 4 baskets claimed
45	Plaintiff recovered 3 pieces: Def. Ex. 36, p. 3, line 30

* All the silver recovered had been placed by Mrs. Seery—together with the unrecovered silver—in her three locked trunks. The silver recovered was found in cupboards and drawers in House #100, and in a box covered with debris in the bathhouse of #100. (Petition for Rehearing, p. 49.)

Amended Schedule A, Record, pp. 58-97 Item No.	
46	Plaintiff recovered 4 pieces: Def. Ex. 36, p. 2, lines 6 and 8, p. 3, line 12
47	Plaintiff recovered 1 piece: Def. Ex. 36, p. 2, line 35
48	Plaintiff recovered 4 small bowls: Def. Ex. 36, p. 2, line 34. However, these were not the 4 "medium size" bowls claimed, which were not recovered
51	Tr. Podhragy, p. 836, Novacek, p. 402, Riley p. 1975 Riley reported 1 silver tray, 3 feet across: Pltf. Ex. 7, Item 633 Plaintiff recovered 3 claimed herein: Def. Ex. 36, p. 2, lines 15-17. Plaintiff recovered 13 other trays not claimed in this action.
52	Plaintiff recovered 1 piece: Def. Ex. 36, p. 10, line 12
53	Riley reported 2 pieces: Pltf.'s Ex. 7, Items 211, 421 Plaintiff recovered 1 piece (Def. Ex. 36, p. 9, line 38
54	Plaintiff recovered 2 pieces (Def. Ex. 36, p. 3, line 29
55	Plaintiff recovered 1 piece (Def. Ex. 36, p. 3, line 28
57	Riley reported 3 pieces: Pl. Ex. 7, Items 614, 621—not recovered
59	Tr. Podhragy, pp. 836, 843 Plaintiff recovered 48 pieces claimed herein, and an additional 47 pieces not claimed in

Amended Schedule A. Record, pp. 58-97 Item No.	
	this suit. Def. Ex. 36, p. 1, lines 35, 40, 41; p. 2, lines 1, 14
60	Tr. Boone, p. 1674, Wotruba, p. 750, Hutter, pp. 2016, 2038 Riley reported 254 pieces—Pltf. Ex. 7, last page Plaintiff recovered 288 pieces claimed, and an additional 78 pieces not claimed in this suit (Def. Ex. 36, p. 1, lines 1, 4, 6-7, 9, 13-14, 17-21, 24-7, 29; p. 3, lines 4-5 7-10 13-15)
62	Riley reported 1 piece: Pl. Ex. 7, Item 760 Plaintiff recovered 7 pieces (2 broken), Def. Ex. 36, p. 6, lines 28-9
65	Riley reported 2 pieces, Pl. Ex. 7, Items 695, 759 Plaintiff recovered 1 piece, Def. Ex. 36, p. 8, line 13
66	Plaintiff recovered 1 piece, Def. Ex. 36, p. 9, line 16
68	Tr. Riley p. 1975 Riley reported 2 cups, 4 stands: Pl. Ex. 7, Items 637, 696
71	Tr. Podhragy, p. 836 Plaintiff recovered 2 pieces, Def. Ex. 36, p. 2, line 20
73	Plaintiff recovered 1 silver pitcher, Def. Ex. 36, p. 2, line 24
76	Plaintiff recovered 1 piece (Def. Ex. 36, p. 2, line 19)
80, 81, 85	Tr. Podhragy, p. 836; Wotruba p. 750

Amended Schedule A, Record, pp. 58-97 Item No.

82 Riley reported 2 pieces, Pl. Ex. 7, Items 466, 832

As to Rugs.

88-89 Tr. Gyssling, pp. 278, 298; Hilfreich, p. 1041

As to Paintings

112-116 Plaintiff recovered 82 of her 109 paintings and pictures (proved to have been on the premises by the inventories of the German Authorities, Def. Ex. 46D-E, Tr. 708-10, 650-51). Of those recovered 3 were damaged (Def. Ex. 21, 21A, Tr. 308), but no claim has been made for such damage (F. 58). 27 were not recovered.

As to Lamps

119 Tr. Wotruba, p. 731

As to Meissen Figurines

120, 121, 123, 124, 125, 127 Tr. Podhragy, p. 845; Wotruba, p. 732; Worrell, p. 1903
Plaintiff recovered only 11 figurines

129 Riley reported 1 fan, Pl. Ex. 7, Item 82
Plaintiff recovered 2 fans, Def. Ex. 36, p. 13, line 6

137 Riley reported 4 pieces, Pl. Ex. 7, Items 852, 857, 859
Plaintiff recovered 4 (1 damaged), Def. Ex. 36, p. 4, line 7; Pl. Ex. 37, p. 1, 5th line from bottom

138 Plaintiff recovered 1 doll, Def. Ex. 36, p. 9, line 32

As to Kitchen Utensils

166 Plaintiff recovered 103 pieces; only carving knives, sharpeners, etc. were missing

Amended Schedules, Record, pp. 58-97 Item No.

BLANKETS

167-8 Riley reported 17 miscellaneous blankets, Pl. Ex. 7, Items 429, 431, 457, 490, 505, 868
Plaintiff recovered 3 (Pl. Ex. 37, p. 9, line 4, p. 10, line 2, p. 11, line 3
Plaintiff is claiming 2.

AS TO LINEN

172, 173, 181 Riley reported 76 sheets, Pl. Ex. 7, Items 140, 166, 185, 206, 232, 491, 508, 529, 871, 869, 874, 889

Plaintiff recovered 47 sheets, Def. Ex. 36, p. 5, line 11; Pl. Ex. 37, p. 9, line 3, p. 10, line 1, p. 11, line 1
Plaintiff is claiming 136 sheets not recovered

174, 181 Riley reported 35 pillowcases, Pl. Ex. 7, Items 142, 169, 187, 209, 233, 280, 492, 507, 528, 876
Plaintiff recovered 64 hand embroidered, lace, large and small, pillowcases (Def. Ex. 36, p. 5, lines 16, 17)
Plaintiff is claiming 168 not recovered

178 Riley reported 4 Silk Puffs (comforters)—2 of which were damaged, Pl. Ex. 7, Items 207, 234, 430, 456. Plaintiff recovered 1, which was dainaged, Pl. Ex. 37, p. 11, line 2

180, 181 Riley reported 3 bed-spreads, Pl. Ex. 7, Items 431, 875, 885

Plaintiff recovered 42, Def. Ex. 36, p. 5, lines 18, 19
Plaintiff is claiming 18 not recovered

Amended Schedule A, —Record, pp. 58-97 Item No.	
182	Riley reported 38 various tablecloths, Pl. Ex. 7, Items 89, 190, 210, 236, 308, 326, 339, 365, 414, 418, 450, 468, 497, 519, 564, 577, 578, 582, 873, 886, 893, 905 Plaintiff recovered 25, Def. Ex. 36, p. 5, lines 22, 23, 25, 26, 27, 29, 31, 32
183, 185, 187, 188	Plaintiff recovered 4 lace tablecloths, Def. Ex. 36, p. 5, lines 31, 32
184	Riley reported 75 napkins (Pl. Ex. 7, Items 167, 172, 235, 261, 870, 877, 878, 887, 896 Plaintiff recovered 35, Def. Ex. 36, p. 5, lines 21, 28, 30
189, 190, 191, 181	Riley reported 50 towels, Pl. Ex. 7, Items 264, 298, 345, 361, 363, 881, 888, 891, 898 Plaintiff recovered 121, Def. Ex. 36, p. 5, lines 12, 13, 14, 15 277 were not recovered
192	Riley reported 34 various curtains, Pl. Ex. 7, Items 94, 158, 178, 216, 412, 471, 479, 567, 585, 883, 897 Plaintiff recovered 15, Def. Ex. 36, p. 15, lines 15, 27, 32
194	Riley reported: Pl. Ex. 7, Items 62, 96, 110, 193, 215, 323, 411, 448, 458, 895 These were recovered but 6 pairs of green silk brocade are still missing.
	As to Tapestries
196-7	Tr. Riley, 1982, Wotruba, p. 669. Riley reported 1 tapestry, Pl. Ex. 7, Item 43 Plaintiff recovered 4 tapestries, Def. Ex. 36, p. 16; 2 are still missing.

APPENDIX C

SECOND WAR POWERS ACT OF 1942 (56 Stat. 181)

TITLE VI—POWER TO REQUISITION

* * *

SEC. 602. The second sentence of the first paragraph of section 1 of the Act of October 16, 1941 (55 Stat. 742), entitled "An Act to authorize the President of the United States to requisition property required for the defense of the United States", is amended by striking out the words "on the basis of the fair market value of the property at" and inserting in lieu thereof the words "as of"; and at the end of such sentence, before the period, inserting the words ", in accordance with the provision for just compensation in the fifth amendment to the Constitution of the United States", so that such sentence will read as follows: "The President shall determine the amount of the fair and just compensation to be paid for any property requisitioned and taken over pursuant to this Act and the fair value of any property returned under section 2 of this Act, but each such determination shall be made as of the time it is requisitioned or returned, as the case may be in accordance with the provision for just compensation in the fifth amendment to the Constitution of the United States."

50 U. S. C. Supp. I, app. § 72

Determination of amount just compensation

55 Stat. 50 U. S. C. Supp. I, app. § 72

APPENDIX D

"EUROPEAN THEATRE OF OPERATIONS
UNITED STATES ARMY

31 Jan 1945

STANDARD OPERATING PROCEDURE
No. 37 (Supersedes ETO-SOP No. 37, 1 May 1944)

PROCEDURE FOR ACQUISITION OF REAL ESTATE
IN OCCUPIED AND LIBERATED COUNTRIES

* * *

11. PROCEDURE FOR USING UNIT. *a.* Units desiring the use of real estate will make request therefor to the Section Engineer, Town Major or other appropriate Engineer officer, in writing, giving the proposed use, size and other pertinent data, and designating where possible, the specific property to be acquired, preferably several days in advance of the date of occupancy.

b. Requests upon Engineer officers for real estate should emanate from the local unit's headquarters, but may be made by any isolated unit.

c. Wherever possible, real estate will be selected which does not require extensive alteration, improvements and repairs. Wherever such services are required, they will be limited to the extent necessary for the military utilization of the real estate.

d. When a unit intends to vacate real property, notice thereof will be given, preferably four days in advance, to the appropriate Engineer officer, in writing, showing the location and the date.

e. Every commanding officer will take the necessary precaution to prevent damage to premises while they are occupied by his command.

f. Immediately upon the occupation of any property, if a Town Major, or other appropriate Engineer officer, is not available, the commanding officer of the occupying unit will cause an inventory to be made of all equipment, mov-

able fixtures and personal property found on the premises, or, if the Engineer officer is available and for reasons of expediency desires the taking of the inventory by the occupying unit, the commanding officer thereof will cause such inventory to be made in accordance with the directions of the Town Major, or other appropriate Engineer officer. The inventory will be in triplicate, one copy for the using service and two copies for the Town Major, or other appropriate Engineer officer, one of which will be forwarded by the Town Major, or other appropriate Engineer officer, to the designated governmental authorities.

g. The commanding officer of the occupying unit will not remove, or permit the removal of, any equipment, movable fixtures or personal property from the premises under his control without the prior written approval of the Town Major, or other appropriate Engineer officer. Furthermore, the commanding officer will not bring other items of personal property which are secured from local authorities on a loan or mutual aid basis into the premises unless markers are placed thereon, indicating that they were not included in the original inventory and noting the location of the place from which they were obtained.

h. Before vacating real estate, the commanding officer of the occupying unit will designate someone under his command to assist the Town Major, or other appropriate Engineer officer, in checking the survey and inventory, and to explain any deficiencies or damages. In the event that a Town Major, or other appropriate Engineer officer, is not available, or, if, for reason of expediency, the Town Major, or other appropriate Engineer officer, so desires, the commanding officer of the unit will cause a check to be made of the survey and inventory noting any deficiencies or damage and notifying the Town Major, or other appropriate Engineer officer, thereof.

* * *

BY COMMAND OF GENERAL EISENHOWER:

R. B. LOVETT, Brigadier General, USA,
Adjutant General"

LE COPY

Office-Supreme Court, U.S.
FILED
FEB 26 1959
JAMES R. BROWNING, Clerk

No. 680

In the Supreme Court of the United States

OCTOBER TERM, 1958

MARIA JERITZA SEERY, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
GEORGE COCHRAN DOUB,
Assistant Attorney General,
SAMUEL D. SLADE,
HERSHEL SHANKS,
Attorneys,
Department of Justice,
Washington 25, D. C.

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 680

MARIA JERITZA SEERY, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Claims (Pet. App. A. 1-A. 8) is reported at 161 F. Supp. 395.

JURISDICTION

The judgment of the Court of Claims was entered on May 7, 1958 (Pet. App. A. 1). A motion for rehearing was denied on November 5, 1958 (R. 167). The petition for a writ of certiorari was filed on January 30, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether the findings of fact made by the Court of Claims with respect to the loss sustained by petitioner as a result of Army occupancy of her Austrian property during 1945, 1946, and 1947 are correct.

STATEMENT

This is a suit for just compensation under the Fifth Amendment for the value of certain personal property which was allegedly lost, destroyed, or stolen during occupancy by the United States Armed Forces of certain premises owned by petitioner in Unterach, Austria, during 1945, 1946 and 1947. Petitioner also seeks recovery for damage to her real estate. The Government initially moved for summary judgment on the ground that under the facts as alleged there had been no taking under the Fifth Amendment. This motion was denied by the Court of Claims in an opinion which held that "the plaintiff's property was taken under such circumstances that she was entitled under the Fifth Amendment to the Constitution, to be paid just compensation". *Seery* v. *United States*, 127 F. Supp. 601, 606.

Following the denial of the Government's motion for summary judgment, the case was referred to a Commissioner of the Court of Claims to determine what property had been taken and its value. After an extended trial, the Commissioner concluded that the value of the property taken from petitioner was $2,132.00 (R. 129). Petitioner filed exceptions to these factual findings of the Commissioner. The Court of Claims, "[w]ithout any pretense of accuracy, and treating the

question as a jury would have to treat it" (Pet. App. A. 7), increased the award to $10,000, plus $1,000 in interest (Pet. App. A. 7-A. 8).

The facts may be briefly summarized as follows: Petitioner, an American citizen, is the owner of three properties in Unterach am Attersee, Austria (Pet. App. A. 1). Property No. 100, known as the "Haus am See", is a castle-like villa of some 20 to 24 rooms (Pet. App. A. 9). Property No. 99, known as the Stoeckl, is a guest house of nine rooms across from the Haus am See (Pet. App. A. 9). Property No. 125, known as the Wachtl Villa, is a smaller villa of nine rooms some distance from the other two properties (Pet. App. A. 9). For approximately two years during 1945, 1946, and 1947, the United States Army took possession of the Haus am See for use as a rest center for officers (Pet. App. A. 3-A. 4). The claim is for the loss, allegedly during the two-year period of Army occupation, of large numbers of highly valuable items of silver, china, crystal, pictures, rugs, linens, tapestry and furniture, as well as for asserted injury to the real property.

Petitioner's major difficulty in proving her loss at the trial was in establishing the presence of the items for which she sought recovery at the time the Americans took possession in 1945. Petitioner herself occupied the Haus am See for the summer months from 1930 to 1935 (Pet. App. A. 9). However, in the fall of 1935, she came to the United States and did not return to Austria until 1948 (Pet. App. A. 2). Her proof of loss is based largely on her memory of an inventory, not introduced in evidence, which she took before she departed in 1935 (Pet. App. A. 4, A. 11). The inventory itself was allegedly stolen in 1948 before the trial,

and in any event was made for her personal use and was neither detailed nor complete (Pet. App. A. 11).

The Government, on the other hand, introduced voluminous testimony tending to show that, regardless of the valuables contained in the houses in 1935, very little of that claimed was there in 1945 when the Army took possession of the Haus am See. Evidence was introduced that a unit of the German Army occupied the property in 1941 (Pet. App. A. 2). At various times after 1941, several of petitioner's friends and relatives, including the former German consul at Los Angeles, occupied parts of the property with petitioner's permission (Pet. App. A. 3). At times there were disagreements between these occupants as to who had prior rights (Pet. App. A. 3). In 1944, the Germans took possession of the Haus am See, first as a nurses' training school, and then as a home for unwed mothers (Pet. App. A. 3).

In addition, the evidence also contains testimony regarding the condition of the property at various times prior to, during, and after the American occupancy, as well as several inventories made by the Germans in 1944 and 1945, by the Americans in 1946 and 1947, and later inventories made by petitioner.

On the entire evidence, the Court of Claims concluded (Pet. App. A. 4-5):

> Most of the missing valuables were relatively small objects, dishes, silver, porcelain decorative pieces, pictures, rugs, etc. They could have been carried off very easily by anyone who had access to them. Probably many of them would, if they had been there, have been carried off by the perhaps thousand or more young officers who made

use of the rest home. We think, however, that not many of these objects were in house No. 100 [the Haus am See] when the Army took possession of it.

In an attempt to deal as equitably as it could with petitioner's claim on this evidence, the Court of Claims awarded petitioner $10,000, plus $1000 in interest (Pet. App. A. 7):

> * * * There were accurate inventories made at the beginning and the end of the second year of the Army's occupancy, and those inventories showed a considerable loss by breakage or disappearance of objects. The first year of occupancy would have involved much more use of the plaintiff's things, with proportionately more breakage and disappearance. The house no doubt had hard usage during the occupancy.
>
> We think a considerable amount of the plaintiff's personal property was lost or destroyed while in the Army's possession, and that considerable damage was done to her house. Without any pretense of accuracy, and treating the question as a jury would have to treat it, we conclude that the plaintiff may recover ten thousand dollars.

ARGUMENT

This petition seeks review of factual findings as to the extent of loss, based on a record of over 2,100 pages, supplemented by 98 exhibits introduced by plaintiff and 53 by the Government. The detailed examination petitioner would have this Court undertake has already been performed twice, first by a Commissioner of the Court of Claims whose findings of fact comprise 29

printed pages, R. 103-131), and then by the Court of Claims which made its own exhaustive study of the record as evidenced by its 31 pages of detailed findings. (Pet. App. A. 8-A. 39). The issues are purely factual and restricted to this particular case. No question of any general application is presented. Further review of the factual issues by this Court is not merited.

CONCLUSION

It is respectfully submitted that the petition for certiorari should be denied.

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FEBRUARY 1959.

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MARIA JERITZA SEERY,

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PETITIONER'S REPLY

It is significant that the Government has made no comment in reply, or in opposition to, the specific questions posed in the petition.

Instead, the Government argues (at p. 6) that the issues presented in the petition are "purely factual and restricted to this particular case."

The Government's position is not well taken. At least one constitutional question of importance and general application is involved which has never before been decided, resulting from the emergence of the United States as the

leading defender of the Western Powers with far-flung military and civilian installations, and will recur* many times in the future, viz.:

> Whether the U. S. Army may requisition private property abroad of an American citizen, remain in sole control to the exclusion of the owner, and fail to give a receipt or inventory for that which it has taken until after 13 months of occupation and hard usage, thus evading responsibility for payment of just compensation under the Fifth Amendment for missing and damaged property.

All the important and underlying factual issues herein have been resolved; viz.:

1. There is no dispute that the property received hard usage and was occupied by over 1,000 young officers over a two-year period, with parties and dances on alternate nights; that an orchestra and entertainers were hired; female guests invited; that there was drinking to the extent that might have been expected; that considerable damage was admittedly done to Mrs. Seery's luxurious personal belongings of both her 12-room Vienna apartment and Unterach castle, at which royal guests had formerly been entertained, and to her landscaped garden and real property in Unterach (Petition, A. 7).

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* Counsel for petitioner is appearing in a substantially similar matter now pending before the United States Court of Claims, entitled "*Sarah Hunter Kelly* v. *The United States*," Index No. 505-55, wherein Mrs. Kelly, a loyal citizen and resident of the United States (including the war years), owned an historic French chateau outside of Paris, which was requisitioned and occupied by the U. S. Forces from October 17, 1944 to August 22, 1945, as a replacement center; 2,500 officers and men passed through the property weekly and substantial damage admittedly occurred. No receipt was ever given by the U. S. Forces to Mrs. Kelly.

2. There is no dispute that the Army was in sole control, that Mrs. Seery, a loyal American citizen, was residing in the United States, that her sisters living in the Wachtl Villa (#125), only ten minutes' distance away, were barred from House #100 and the Guest House #99 and thus disabled from making an inventory at the time of requisition (Petition, p. 8).

3. There is no dispute that the receipt and inventory furnished to Mrs. Seery in September 1946 covered only what remained of her property 13 months after requisition. The Court below, in awarding $10,000, recognized that items of at least that value were taken or damaged which had not been listed in said receipt and inventory.

4. Nowhere has it been denied that the Army made previous inventories (of which multiple copies were required), which were not furnished to Mrs. Seery and were not produced herein by the Government. (Petition, pp. 21-22)

The only issue involved, which may possibly be stated to have a factual aspect, is whether or not Mrs. Seery's missing property (conceded to have been present in 1935) was on the premises at the time of requisition. The Court below held that the missing items *may* not have been there. In the absence of a proper receipt and inventory at the time of requisition—proof to which Mrs. Seery contends she was entitled in view of the fact that she was disabled by the Army from making her own inventory at that time—due weight should have been given to the oral testimony of the Government's own witnesses in petitioner's favor. It has not been disputed that the Government's witnesses gave such testimony, which is set forth in Question B of the petition (pp. 16-20). The only issue remaining then is a legal one, which was posed by petitioner: whether or

not the Court erred in disregarding consistently such testimony which established the presence of much of Mrs. Seery's missing property while the Army was in occupation.

However, the fundamental and primary issue before this Court is the spelling out of the respective responsibilities of the U. S. Forces and the loyal U. S. citizen-owner (absentee or otherwise), under the Fifth Amendment, when private property abroad is requisitioned. The license, by the Court below, to the Army to take property and fail to give a receipt therefor for a year after the taking—during which period the property disappeared or was damaged—if permitted to stand, will have far-reaching and disastrous consequences on the constitutional rights of United States citizens. It is respectfully submitted that this question should be reviewed and settled.

That the Government had a duty to produce its inventory records made at the time of requisition and during the first 13 months of occupation, under the circumstances of this case, and was guilty of a wrong in failing to produce them—should also be reviewed.

The responsibility of the Army should be clarified in a situation such as the instant case, where a locked silver trunk was opened by a U. S. Army Officer, part of its contents removed, the balance exposed to view, the trunk abandoned in an unlockable condition in the Guest House #99, and the empty trunk subsequently found in the attic of House #100 while the Army was still in occupation thereof. (Petition, pp. 18-19)

Two further questions were posed in the petition: (1) Did the Court below err in holding that Mrs. Seery had not proved how her property was disposed of, or the extent of damage done by the Army, or the authority for the mis-

appropriations, in disregard of the previous ruling of this Court that it is no concern of the owner what happens to her property while the Army remains in sole control and during her exclusion from the premises; and (2) Did the Court below err in restricting interest to less than 1% as part of just compensation although Mrs. Seery proved that damage had occurred for which she was entitled to compensation in 1945? (Petition, Questions C and F, pp. 20-21, 23)

It is necessary to correct a number of inaccurate statements made by the Government in its opposing memorandum, viz.:

Page 3, last paragraph:

It is not correct to state "Her proof of loss is based largely on her *memory* of an inventory * * * ". The true fact is that in 1935 when Mrs. Seery left Unterach, she and her secretary made two copies of a complete inventory, for her own personal use with such details as she required, of all the items on the premises at that time including those contained in the three vans from Vienna which had already arrived. The contents of one van, which did not arrive until a year later, was not listed in said inventory. (Petition, A. 10-11, F. #7-8)

Mrs. Seery's 1935 inventory was not "allegedly stolen". It *was* stolen, as the Court found (Petition, A. 10-11, F. #8; A. 37 (F. #54)). It was proved at the trial that said inventory—before its theft—was used as the basis in the preparation of petitioner's Schedule of Damages, 24 copies of which were filed with the Army.

Page 4, first paragraph:

This paragraph is replete with inaccuracies. The Court below found that there was "some evidence, by no means conclusive" of occupation by a unit of the German Army in 1941. As pointed out in the petition (p. 6), had the German Army occupied petitioner's property, it could not have remained hidden in the small village and certainly was not disposed to do so. Its presence would have been conclusively proved by the U. S. Army, which had in its control all local occupation records of that section of Austria.

It is a gross misstatement to say that "several of petitioner's friends and relatives, including the former German Consul at Los Angeles, occupied parts of the property with petitioner's permission.". Mrs. Seery (at that time the wife of Winfield Sheehan, President of Twentieth Century Fox—now deceased) had a wide circle of acquaintances in the theatre, in opera, in the conduct of charitable projects, among consular and other officials of many governments, etc. In 1941, at the request of the former German Consul in Los Angeles, she granted him permission to occupy two rooms in her Guest House #99—*which was not the requisitioned property* (Petition, A. 12-13). No one was ever given permission by her to occupy House #100.

The evidence is that the new wing of House #100, in which missing items were present, remained undisturbed with its rooms separately locked until 1944 (Petition, page 5).

There were never any disagreements—as the Government alleges—concerning the occupation of House #100. There was a disagreement concerning the Wachtl Villa,

House #125—*which was not the requisitioned property.* When Mrs. Seery's sisters and family, including 4 small children, returned from a concentration camp upon their release by the U. S. Forces, they found House #125 occupied by Mrs. Boone, the Army hostess, and a large group of her friends and family, who refused to permit Mrs. Seery's family to enter their own home. The Burgermeister correctly demanded that Mrs. Boone and her relatives and friends vacate the premises (Petition, A. 18, F. #23.)

Page 4, second paragraph:

This paragraph is misleading. The testimony of the Government's own witnesses (plaintiff had not a single witness of her own) before and during the occupation establishes the presence of much of Mrs. Seery's property (Petition, pp. 16-29).

The German inventories made in 1944 and 1945 were inadequate and *did not even list items set forth in the Army's July 1946 inventory* (Petition, pp. 19-20). These inventories, although inadequate, actually support the testimony of the Government's own witnesses in Mrs. Seery's favor, that her valuable property was removed by petitioner's sister at the direction of the German Authorities for safekeeping to the locked rooms in the Guest House #99. House #100, as the Government's witnesses testified, upon the arrival of the U. S. Army was refurnished as it had been when Mrs. Seery was in residence, that the "house was then completely furnished; it was furnished good." The production by the Government of the inadequate German inventories cannot absolve the failure of the U. S. Forces to furnish Mrs. Seery with a proper receipt and inventory upon requisition; nor can their production excuse the Government's failure to produce

herein the inventories made by the U. S. Army during the first 13 months of occupation.

Page 5:

While it is true, as stated in defendant's Argument, that the testimony and exhibits were examined by the Commissioner and by the Court, it was found necessary for the Court below to amend 29 of the Commissioner's 67 findings of fact and eliminate one additional finding completely. Upon review by this Court, consideration need be given only to the pages of the testimony and few exhibits specifically referred to in the petition.

The petitioner's request for certiorari should be granted, as prayed for.

Respectfully submitted,

GUSTAVE I. JAHR,
Attorney for Petitioner.

GUSTAVE I. JAHR,
Of Counsel.

Filed March 3, 1959.